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VOLUME 496

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1989

JUNE 4 THROUGH JUNE 20, 1990

FRANK D. WAGNER

REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WILLIAM H. REHNQUIST, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.
SANDRA DAY O'CONNOR, Associate Justice.
ANTONIN SCALIA, Associate Justice.
ANTHONY M. KENNEDY, Associate Justice.

RETIRED

WARREN E. BURGER, Chief Justice.
LEWIS F. POWELL, Jr., Associate Justice.

OFFICERS OF THE COURT

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KENNETH W. STARR, Solicitor General.
JOSEPH F. SPANIOL, Jr., Clerk.
FRANK D. WAGNER, Reporter of Decisions.
ALFRED WONG, Marshal.
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SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective February 18, 1988, viz.:

For the District of Columbia Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, ANTONIN SCALIA, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, ANTHONY M. KENNEDY, Associate Justice.

For the Federal Circuit, WILLIAM H. REHNQUIST, Chief Justice.

February 18, 1988.

(For next previous allotment, and modifications, see 479 U. S., p. V, 483 U. S., pp. V, VI, and 484 U. S., pp. V, VI.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1989

KELLER ET AL. *v.* STATE BAR OF CALIFORNIA ET AL.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 88–1905. Argued February 27, 1990—Decided June 4, 1990

Respondent State Bar of California (State Bar) is an "integrated bar"—*i. e.*, an association of attorneys in which membership and dues are required as a condition of practicing law—created under state law to regulate the State's legal profession. In fulfilling its broad statutory mission to "promote the improvement of the administration of justice," the Bar uses its membership dues for self-regulatory functions, such as formulating rules of professional conduct and disciplining members for misconduct. It also uses dues to lobby the legislature and other governmental agencies, file *amicus curiae* briefs in pending cases, hold an annual delegates conference for the debate of current issues and the approval of resolutions, and engage in educational programs. Petitioners, State Bar members, brought suit in state court claiming that through these latter activities the Bar expends mandatory dues payments to advance political and ideological causes to which they do not subscribe, in violation of their First and Fourteenth Amendment rights to freedom of speech and association. They requested, *inter alia*, an injunction restraining the Bar from using mandatory dues or its name to advance political and ideological causes or beliefs. The court granted summary judgment to the Bar on the grounds that it is a governmental agency and therefore permitted under the First Amendment to engage in the challenged activities. The Court of Appeal reversed, holding that, while the Bar's regulatory activities were similar to those of a government agency, its "administration-of-justice" functions were more akin to the activities of a labor union. Relying on the analysis of *Abood* v. *Detroit Bd. of*

Education, 431 U. S. 209—which prohibits the agency-shop dues of dissenting nonunion employees from being used to support political and ideological union causes that are unrelated to collective-bargaining activities—the court held that the Bar's activities could be financed from mandatory dues only if a particular action served a state interest important enough to overcome the interference with dissenters' First Amendment rights. The State Supreme Court reversed, reasoning that the Bar was a "government agency" that could use its dues for any purpose within the scope of its statutory authority, and that subjecting the Bar's activities to First Amendment scrutiny would place an "extraordinary burden" on its statutory mission. With the exception of certain election campaigning, the court found that all of the challenged activities fell within the Bar's statutory authority.

Held:

1. The State Bar's use of petitioners' compulsory dues to finance political and ideological activities with which petitioners disagree violates their First Amendment right of free speech when such expenditures are not necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services. Pp. 9–17.

(a) The State Supreme Court's determination that the State Bar is a "government agency" for the purposes of state law is not binding on this Court when such a determination is essential to the decision of a federal question. The State Bar is not a typical "government agency." The Bar's principal funding comes from dues levied on its members rather than from appropriations made by the legislature; its membership is composed solely of lawyers admitted to practice in the State; and its services by way of governance of the profession are essentially advisory in nature, since the ultimate responsibility of such governance is reserved by state law to the State Supreme Court. By contrast, there is a substantial analogy between the relationship of the Bar and its members and that of unions and their members. Just as it is appropriate that employees who receive the benefit of union negotiation with their employer pay their fair share of the cost of that process by paying agency-shop dues, it is entirely appropriate that lawyers who derive benefit from the status of being admitted to practice before the courts should be called upon to pay a fair share of the cost of the professional involvement in this effort. The State Bar was created, not to participate in the general government of the State, but to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession. These differences between the State Bar and traditional government agencies render unavailing respondents' argument that it is not subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions. Pp. 10–13.

1 Syllabus

(b) *Abood* cannot be distinguished on the ground that the compelled association in the context of labor unions serves only a private economic interest in collective bargaining while the Bar serves more substantial public interests. In fact, the legislative recognition that the agency-shop arrangements serve vital national interests in preserving industrial peace indicates that they serve a substantial public interest as well. It is not possible to determine that the Bar's interests outweigh these other interests sufficiently to produce a different result here. P. 13.

(c) The guiding standard for determining permissible Bar expenditures relating to political or ideological activities is whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services. Precisely where the line falls between permissible and impermissible dues-financed activities will not always be easy to discern. But the extreme ends of the spectrum are clear: Compulsory dues may not be used to endorse or advance a gun control or nuclear weapons freeze initiative, but may be spent on activities connected with disciplining Bar members or proposing the profession's ethical codes. Pp. 13–16.

(d) Since the Bar is already required to submit detailed budgets to the state legislature before obtaining approval to set annual dues, the State Supreme Court's assumption that complying with *Abood* would create an extraordinary burden for the Bar is unpersuasive. Any burden that might result is insufficient to justify contravention of a constitutional mandate, and unions have operated successfully within the boundaries of *Abood* procedures for over a decade. An integrated bar could meet its *Abood* obligation by adopting the sort of procedures described in *Teachers* v. *Hudson*, 475 U. S. 292. Questions whether alternative procedures would also satisfy the obligation should be left for consideration upon a more fully developed record. Pp. 16–17.

2. Petitioners' freedom of association claim based on the State Bar's use of its name to advance political and ideological causes or beliefs will not be addressed by this Court in the first instance. P. 17.

47 Cal. 3d 1152, 767 P. 2d 1020, reversed and remanded.

REHNQUIST, C. J., delivered the opinion for a unanimous Court.

Anthony T. Caso argued the cause for petitioners. With him on the briefs were *Ronald A. Zumbrun* and *John H. Findley*.

Seth M. Hufstedler argued the cause for respondents. With him on the brief were *Robert S. Thompson, Laurie D.*

Zelon, Judith R. Starr, Herbert M. Rosenthal, and *Diane Yu.**

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioners, members of respondent State Bar of California, sued that body, claiming its use of their membership dues to finance certain ideological or political activities to which they were opposed violated their rights under the First Amendment of the United States Constitution. The Supreme Court of California rejected this challenge on the grounds that the State Bar is a state agency and, as such, may use the dues for any purpose within its broad statutory authority. We agree that lawyers admitted to practice in the State may be required to join and pay dues to the State Bar, but disagree as to the scope of permissible dues-financed activities in which the State Bar may engage.

The State Bar is an organization created under California law to regulate the State's legal profession.[1] It is

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*Briefs of *amici curiae* urging reversal were filed for the Ad Hoc Committee Opposing Lobbying and Certain Other Activities of a Mandatory Bar by *James J. Bierbower;* for the American Civil Liberties Union by *Steven R. Shapiro* and *John A. Powell;* for the National Right to Work Legal Defense Foundation by *Edwin Vieira;* for the Washington Legal Foundation et al. by *Daniel J. Popeo, Paul D. Kamenar,* and *John C. Scully;* for Robert E. Gibson by *Herbert R. Kraft;* for Trayton L. Lathrop, *pro se;* and for Joseph W. Little, *pro se.*

Briefs of *amici curiae* urging affirmance were filed for the American Bar Association by *L. Stanley Chauvin, Jr., Carter G. Phillips,* and *Mark D. Hopson;* for the American Federation of Labor and Congress of Industrial Organizations by *Marsha S. Berzon* and *Laurence Gold;* for the Beverly Hills Bar Association et al. by *Ellis J. Horvitz* and *Peter Abrahams;* for the California Legislature by *Bion M. Gregory;* for the Lawyers' Committee for the Administration of Justice by *James J. Brosnahan;* for the State Bar of Michigan et al. by *Michael Franck* and *Michael J. Karwoski;* and for the State Bar of Wisconsin et al. by *John S. Skilton, Barry S. Richard,* and *Stephen L. Tober.*

Steven Levine, *pro se,* filed a brief of *amicus curiae.*

[1] The State Bar's Board of Governors is also a respondent in this action. Accordingly, the terms "respondent" or "State Bar" will refer either to the

an entity commonly referred to as an "integrated bar"—an association of attorneys in which membership and dues are required as a condition of practicing law in a State. Respondent's broad statutory mission is to "promote 'the improvement of the administration of justice.'" 47 Cal. 3d 1152, 1156, 767 P. 2d 1020, 1021 (1989) (quoting Cal. Bus. & Prof. Code Ann. §6031(a) (West Supp. 1990)). The association performs a variety of functions such as "examining applicants for admission, formulating rules of professional conduct, disciplining members for misconduct, preventing unlawful practice of the law, and engaging in study and recommendation of changes in procedural law and improvement of the administration of justice." 47 Cal. 3d, at 1159, 767 P. 2d, at 1023–1024 (internal quotation marks omitted). Respondent also engages in a number of other activities which are the subject of the dispute in this case. "[T]he State Bar for many years has lobbied the Legislature and other governmental agencies, filed amicus curiae briefs in pending cases, held an annual conference of delegates at which issues of current interest are debated and resolutions approved, and engaged in a variety of education programs." *Id.*, at 1156, 767 P. 2d, at 1021–1022. These activities are financed principally through the use of membership dues.

Petitioners, 21 members of the State Bar, sued in state court claiming that through these activities respondent expends mandatory dues payments to advance political and ideological causes to which they do not subscribe.[2] Assert-

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organization itself, or the organization and its governing board, as the context warrants.

[2] Some of the particular activities challenged by petitioners were described in the complaint as follows:

(1) Lobbying for or against state legislation prohibiting state and local agency employers from requiring employees to take polygraph tests; prohibiting possession of armor-piercing handgun ammunition; creating an unlimited right of action to sue anybody causing air pollution; creating criminal sanctions for violation of laws pertaining to the display for sale of drug paraphernalia to minors; limiting the right to individualized education programs for students in need of special education; creating an unlimited

ing that their compelled financial support of such activities violates their First and Fourteenth Amendment rights to freedom of speech and association, petitioners requested, *inter alia*, an injunction restraining respondent from using mandatory bar dues or the name of the State Bar to advance political and ideological causes or beliefs. The trial court granted summary judgment to respondent on the grounds that it is a governmental agency and therefore permitted under the First Amendment to engage in the challenged activities. The California Court of Appeal reversed, holding that while respondent's regulatory activities were similar to those of a government agency, its "administration-of-justice" functions were more akin to the activities of a labor union. The court held that under our opinion in *Abood* v. *Detroit Board of Education*, 431 U. S. 209 (1977), such activities "could be financed from mandatory dues only if the particular action in question served a state interest important enough to overcome the interference with dissenters' First Amendment rights." 47 Cal. 3d, at 1159, 767 P. 2d, at 1023.

The Supreme Court of California reversed the Court of Appeal by a divided vote. The court reasoned that respond-

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exclusion from gift tax for gifts to pay for education tuition and medical care; providing that laws providing for the punishment of life imprisonment without parole shall apply to minors tried as adults and convicted of murder with a special circumstance; deleting the requirement that local government secure approval of the voters prior to constructing low-rent housing projects; requesting Congress to refrain from enacting a guest-worker program or from permitting the importation of workers from other countries;

(2) Filing *amicus curiae* briefs in cases involving the constitutionality of a victim's bill of rights; the power of a workers' compensation board to discipline attorneys; a requirement that attorney-public officials disclose names of clients; the disqualification of a law firm; and

(3) The adoption of resolutions by the Conference of Delegates endorsing a gun control initiative; disapproving the statements of a United States senatorial candidate regarding court review of a victim's bill of rights; endorsing a nuclear weapons freeze initiative; opposing federal legislation limiting federal-court jurisdiction over abortions, public school prayer, and busing. App. 9–13.

ent's status as a public corporation, as well as certain of its other characteristics, made it a "government agency." It also expressed its belief that subjecting respondent's activities to First Amendment scrutiny would place an "extraordinary burden" on its mission to promote the administration of justice. *Id.*, at 1161–1166, 767 P. 2d, at 1025–1028. The court distinguished other cases subjecting the expenditures of state bar associations to First Amendment scrutiny, see, *e. g.*, *Gibson* v. *The Florida Bar*, 798 F. 2d 1564 (CA11 1986), on the grounds that none of the associations involved in those cases rested "upon a constitutional and statutory structure comparable to that of the California State Bar. None involves an extensive degree of legislative involvement and regulation." 47 Cal. 3d, at 1167, 767 P. 2d, at 1029. The court concluded that "the State Bar, considered as a government agency, may use dues for any purpose within the scope of its statutory authority." *Id.*, at 1168, 767 P. 2d, at 1030. With the exception of certain election campaigning conducted by respondent and its president, the court found that all of respondent's challenged activities fell within its statutory authority. *Id.*, at 1168–1173, 767 P. 2d, at 1030–1033. We granted certiorari, 493 U. S. 806 (1989), to consider petitioners' First Amendment claims. We now reverse and remand for further proceedings.

In *Lathrop* v. *Donohue*, 367 U. S. 820 (1961), a Wisconsin lawyer claimed that he could not constitutionally be compelled to join and financially support a state bar association which expressed opinions on, and attempted to influence, legislation. Six Members of this Court, relying on *Railway Employes* v. *Hanson*, 351 U. S. 225 (1956), rejected this claim.

> "In our view the case presents a claim of impingement upon freedom of association no different from that which we decided in *[Hanson]*. We there held that § 2, Eleventh of the Railway Labor Act . . . did not on its face

abridge protected rights of association in authorizing union-shop agreements between interstate railroads and unions of their employees conditioning the employees' continued employment on payment of union dues, initiation fees and assessments. . . . In rejecting Hanson's claim of abridgment of his rights of freedom of association, we said, 'On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar.' 351 U. S., at 238. Both in purport and in practice the bulk of State Bar activities serve the function, or at least so Wisconsin might reasonably believe, of elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the State, without any reference to the political process. It cannot be denied that this is a legitimate end of state policy. We think that the Supreme Court of Wisconsin, in order to further the State's legitimate interests in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity. Given the character of the integrated bar shown on this record, in the light of the limitation of the membership requirement to the compulsory payment of reasonable annual dues, we are unable to find any impingement upon protected rights of association." *Lathrop*, 367 U. S., at 842–843 (plurality opinion) (footnote omitted).

Justice Harlan, joined by Justice Frankfurter, similarly concluded that "[t]he *Hanson* case . . . decided by a unanimous Court, surely lays at rest all doubt that a State may constitutionally condition the right to practice law upon membership in an integrated bar association, a condition fully as justified

by state needs as the union shop is by federal needs." *Id.*, at 849 (opinion concurring in judgment).

The *Lathrop* plurality emphasized, however, the limited scope of the question it was deciding: "[Lathrop's] compulsory enrollment imposes only the duty to pay dues. . . . We therefore are confronted, as we were in *[Hanson]*, only with a question of compelled financial support of group activities, not with involuntary membership in any other aspect." *Id.*, at 827–828 (footnote omitted). Indeed, the plurality expressly reserved judgment on Lathrop's additional claim that his free speech rights were violated by the Wisconsin Bar's use of his mandatory dues to support objectionable political activities, believing that the record was not sufficiently developed to address this particular claim.[3] Petitioners here present this very claim for decision, contending that the use of their compulsory dues to finance political and ideological activities of the State Bar with which they disagree violates their rights of free speech guaranteed by the First Amendment.

In *Abood* v. *Detroit Board of Education*, 431 U. S. 209 (1977), the Court confronted the issue whether, consistent with the First Amendment, agency-shop dues of nonunion public employees could be used to support political and ideological causes of the union which were unrelated to collective-bargaining activities. We held that while the Constitution did not prohibit a union from spending "funds for the expression of political views . . . or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative," the Constitution did require that such expenditures be "financed from charges, dues, or assessments paid by employees who [did] not object to advancing those ideas and who [were] not coerced into doing so against their will by the threat of loss of governmental employment." *Id.*, at 235–236. The Court noted that just as

[3] Justice Harlan would have reached this claim and decided that it lacked merit. See *Lathrop* v. *Donohue*, 367 U. S., at 848–865.

prohibitions on making contributions to organizations for political purposes implicate fundamental First Amendment concerns, see *Buckley* v. *Valeo*, 424 U. S. 1 (1976), "compelled . . . contributions for political purposes works no less an infringement of . . . constitutional rights." *Abood*, *supra*, at 234. The Court acknowledged Thomas Jefferson's view that "'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.'" 431 U. S., at 234–235, n. 31 (quoting I. Brant, James Madison: The Nationalist 354 (1948)). While the decision in *Abood* was also predicated on the grounds that a public employee could not be compelled to relinquish First Amendment rights as a condition of public employment, see 431 U. S., at 234–236, in the later case of *Ellis* v. *Railway Clerks*, 466 U. S. 435 (1984), the Court made it clear that the principles of *Abood* apply equally to employees in the private sector. See 466 U. S., at 455–457.

Although several federal and state courts have applied the *Abood* analysis in the context of First Amendment challenges to integrated bar associations, see 47 Cal. 3d, at 1166, 767 P. 2d, at 1028 (collecting cases), the California Supreme Court in this case held that respondent's status as a regulated state agency exempted it from any constitutional constraints on the use of its dues. "If the bar is considered a governmental agency, then the distinction between revenue derived from mandatory dues and revenue from other sources is immaterial. A governmental agency may use unrestricted revenue, whether derived from taxes, dues, fees, tolls, tuition, donation, or other sources, for any purposes within its authority." *Id.*, at 1167, 767 P. 2d, at 1029. Respondent also urges this position, invoking the so-called "government speech" doctrine: "The government must take substantive positions and decide disputed issues to govern. . . . So long as it bases its actions on legitimate goals, government may speak despite citizen disagreement with the content of its message, for government is not required to be content-neutral." Brief for

Respondents 16. See also *Abood*, *supra*, at 259, n. 13 (Powell, J., concurring in judgment) ("[T]he reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people").

Of course the Supreme Court of California is the final authority on the "governmental" status of the State Bar of California for purposes of state law. But its determination that respondent is a "government agency," and therefore entitled to the treatment accorded a governor, a mayor, or a state tax commission, for instance, is not binding on us when such a determination is essential to the decision of a federal question. The State Bar of California is a good deal different from most other entities that would be regarded in common parlance as "governmental agencies." Its principal funding comes, not from appropriations made to it by the legislature, but from dues levied on its members by the board of governors.[4] Only lawyers admitted to practice in the State of California are members of the State Bar, and all 122,000 lawyers admitted to practice in the State must be members. Respondent undoubtedly performs important and valuable services for the State by way of governance of the profession, but those services are essentially advisory in nature. The State Bar does not admit anyone to the practice of law, it does not finally disbar or suspend anyone, and it does not ultimately establish ethical codes of conduct. All of those functions are reserved by California law to the State Supreme Court. See Cal. Bus. & Prof. Code Ann. § 6064 (West 1974) (admissions); § 6076 (rules of professional conduct); Cal. Bus.

[4] In 1982, the year the complaint in this action was filed, approximately 85% of the State Bar's general funding came from membership dues with the balance made up of fees charged for various bar activities. The State Bar's general funds support the bulk of its activities with the exception of the State Bar's applicant admission functions and other miscellaneous activity. The State Bar's admission functions are not funded from general revenues but rather from fees charged to applicants taking the bar examination. App. 76–77.

& Prof. Code Ann. § 6100 (West Supp. 1990) (disbarment or suspension).

There is, by contrast, a substantial analogy between the relationship of the State Bar and its members, on the one hand, and the relationship of employee unions and their members, on the other. The reason behind the legislative enactment of "agency-shop" laws is to prevent "free riders"—those who receive the benefit of union negotiation with their employers, but who do not choose to join the union and pay dues—from avoiding their fair share of the cost of a process from which they benefit. The members of the State Bar concededly do not benefit as directly from its activities as do employees from union negotiations with management, but the position of the organized bars has generally been that they prefer a large measure of self-regulation to regulation conducted by a government body which has little or no connection with the profession. The plan established by California for the regulation of the profession is for recommendations as to admission to practice, the disciplining of lawyers, codes of conduct, and the like to be made to the courts or the legislature by the organized bar. It is entirely appropriate that all of the lawyers who derive benefit from the unique status of being among those admitted to practice before the courts should be called upon to pay a fair share of the cost of the professional involvement in this effort.

But the very specialized characteristics of the State Bar of California discussed above served to distinguish it from the role of the typical government official or agency. Government officials are expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents. With countless advocates outside of the government seeking to influence its policy, it would be ironic if those charged with making governmental decisions were not free to speak for themselves in the process. If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over

issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed. Cf. *United States* v. *Lee*, 455 U. S. 252, 260 (1982) ("The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief").

The State Bar of California was created, not to participate in the general government of the State, but to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession. Its members and officers are such not because they are citizens or voters, but because they are lawyers. We think that these differences between the State Bar, on the one hand, and traditional government agencies and officials, on the other hand, render unavailing respondent's argument that it is not subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions representing public and private employees.

Respondent would further distinguish the two situations on the grounds that the compelled association in the context of labor unions serves only a private economic interest in collective bargaining, while the State Bar serves more substantial public interests. But legislative recognition that the agency-shop arrangements serve vital national interests in preserving industrial peace, see *Ellis*, 466 U. S., at 455–456, indicates that such arrangements serve substantial public interests as well. We are not possessed of any scales which would enable us to determine that the one outweighs the other sufficiently to produce a different result here.

Abood held that a union could not expend a dissenting individual's dues for ideological activities not "germane" to the purpose for which compelled association was justified: collective bargaining. Here the compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal serv-

ices. The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity. The difficult question, of course, is to define the latter class of activities.

Construing the Railway Labor Act in *Ellis*, *supra*, we held:

> "[W]hen employees such as petitioners object to being burdened with particular union expenditures, the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit." *Id.*, at 448.

We think these principles are useful guidelines for determining permissible expenditures in the present context as well. Thus, the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or "improving the quality of the legal service available to the people of the State." *Lathrop*, 367 U. S., at 843 (plurality opinion).

The Supreme Court of California decided that most of the activities complained of by petitioners were within the scope of the State Bar's statutory authority and were therefore not only permissible but could be supported by the compulsory dues of objecting members. The Supreme Court of California quoted the language of the relevant statute to the effect

that the State Bar was authorized to "'aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice.'" 47 Cal. 3d, at 1169, 767 P. 2d, at 1030. Simply putting this language alongside our previous discussion of the extent to which the activities of the State Bar may be financed from compulsory dues might suggest that there is little difference between the two. But there is a difference, and that difference is illustrated by the allegations in petitioners' complaint as to the kinds of State Bar activities which the Supreme Court of California has now decided may be funded with compulsory dues.

Petitioners assert that the State Bar has engaged in, *inter alia*, lobbying for or against state legislation (1) prohibiting state and local agency employers from requiring employees to take polygraph tests; (2) prohibiting possession of armor-piercing handgun ammunition; (3) creating an unlimited right of action to sue anybody causing air pollution; and (4) requesting Congress to refrain from enacting a guest-worker program or from permitting the importation of workers from other countries. Petitioners' complaint also alleges that the conference of delegates funded and sponsored by the State Bar endorsed a gun control initiative, disapproved statements of a United States senatorial candidate regarding court review of a victim's bill of rights, endorsed a nuclear weapons freeze initiative, and opposed federal legislation limiting federal-court jurisdiction over abortions, public school prayer, and busing. See n. 2, *supra*.

Precisely where the line falls between those State Bar activities in which the officials and members of the Bar are acting essentially as professional advisers to those ultimately charged with the regulation of the legal profession, on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals, on the other, will not always be easy to discern. But the extreme ends of the spectrum are clear:

Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the Bar or proposing ethical codes for the profession.

In declining to apply our *Abood* decision to the activities of the State Bar, the Supreme Court of California noted that it would entail "an extraordinary burden. . . . The bar has neither time nor money to undertake a bill-by-bill, case-by-case *Ellis* analysis, nor can it accept the risk of litigation every time it decides to lobby a bill or brief a case." 47 Cal. 3d, at 1165–1166, 767 P. 2d, at 1028. In this respect we agree with the assessment of Justice Kaufman in his concurring and dissenting opinions in that court:

> "[C]ontrary to the majority's assumption, the State Bar would not have to perform the three-step *Ellis* analysis prior to each instance in which it seeks to advise the Legislature or the courts of its views on a matter. Instead, according to [*Teachers* v.] *Hudson*, [475 U. S. 292 (1986)] 'the constitutional requirements for the [association's] collection of . . . fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.' (*Id.* at 310). Since the bar already is statutorily required to submit detailed budgets to the Legislature prior to obtaining approval for setting members' annual dues (Bus. and Prof. Code § 6140.1), the argument that the constitutionally mandated procedure would create 'an extraordinary burden' for the bar is unpersuasive.
>
> "While such a procedure would likely result in some additional administrative burden to the bar and perhaps prove at times to be somewhat inconvenient, such additional burden or inconvenience is hardly sufficient to jus-

tify contravention of the constitutional mandate. It is noteworthy that unions representing government employees have developed, and have operated successfully within the parameters of *Abood* procedures for over a decade." *Id.*, at 1192, 767 P. 2d, at 1046 (citations and footnote omitted).

In *Teachers* v. *Hudson*, 475 U. S. 292 (1986), where we outlined a minimum set of procedures by which a union in an agency-shop relationship could meet its requirement under *Abood*, we had a developed record regarding different methods fashioned by unions to deal with the "free rider" problem in the organized labor setting. We do not have any similar record here. We believe an integrated bar could certainly meet its *Abood* obligation by adopting the sort of procedures described in *Hudson*. Questions whether one or more alternative procedures would likewise satisfy that obligation are better left for consideration upon a more fully developed record.

In addition to their claim for relief based on respondent's use of their mandatory dues, petitioners' complaint also requested an injunction prohibiting the State Bar from using its name to advance political and ideological causes or beliefs. See *supra*, at 5–6. This request for relief appears to implicate a much broader freedom of association claim than was at issue in *Lathrop*. Petitioners challenge not only their "compelled financial support of group activities," see *supra*, at 9, but urge that they cannot be compelled to associate with an organization that engages in political or ideological activities beyond those for which mandatory financial support is justified under the principles of *Lathrop* and *Abood*. The California courts did not address this claim, and we decline to do so in the first instance. The state courts remain free, of course, to consider this issue on remand.

The judgment of the Supreme Court of California is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

McKESSON CORPORATION *v.* DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION OF FLORIDA, ET AL.

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 88–192. Argued March 22, 1989—Reargued December 6, 1989—Decided June 4, 1990

After *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263, held that Hawaii's liquor excise tax scheme—which allowed tax preferences for alcoholic beverages manufactured from certain products grown in the State—violated the Commerce Clause because it had the purpose and effect of discriminating against interstate commerce, Florida revised its similar tax preference scheme to provide special rate reductions for specified products commonly grown in that State and used in alcoholic beverages produced there. Petitioner McKesson Corporation, a wholesale liquor distributor whose products did not qualify for the rate reductions, paid the applicable taxes for a number of months. McKesson then filed suit in state court against respondent taxing authorities seeking, *inter alia*, a refund in the amount of the excess taxes it had paid as a result of its disfavored treatment. The trial court invalidated the tax scheme under *Bacchus Imports*, enjoining future enforcement of the preferential rate reductions, but declined to order a refund or any other form of relief for taxes McKesson had already paid. The court's order was stayed pending appeal, and the State continued to collect taxes with the local preferences still in effect. The Florida Supreme Court ultimately affirmed in all respects, ruling that the refusal to order a refund was proper in light of "equitable considerations."

Held:

1. The Eleventh Amendment—which provides in part that the federal "[j]udicial power . . . shall not . . . extend to any suit . . . commenced or prosecuted against one of the United States by Citizens"—does not preclude the Supreme Court's exercise of appellate jurisdiction over cases brought against States that arise from state courts. This view has been implicit in the Court's consistent practice and uniformly endorsed in its cases, including cases involving state tax refund actions brought in state court, for almost 170 years. See, *e. g.*, *Cohens* v. *Virginia*, 6 Wheat. 264, 412; *General Oil Co.* v. *Crain*, 209 U. S. 211, 233; *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803. Pp. 26–31.

2. If a State penalizes taxpayers for failure to remit their taxes in a timely fashion, thus requiring them to pay first and obtain review of the

tax's validity later in a refund action, the Due Process Clause of the Fourteenth Amendment requires the State to afford them meaningful postpayment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional. Pp. 31–52.

(a) This Court's precedents demonstrate the traditional legal analysis appropriate for determining Florida's constitutional duty to provide retrospective relief to McKesson for its payment of an unlawful tax. *Atchison, T. & S. F. R. Co.* v. *O'Connor*, 223 U. S. 280, 285–286; *Ward* v. *Love County Board of Comm'rs*, 253 U. S. 17, 24; *Carpenter* v. *Shaw*, 280 U. S. 363, 369; *Montana National Bank of Billings* v. *Yellowstone County*, 276 U. S. 499, 504, 505; *Iowa-Des Moines National Bank* v. *Bennett*, 284 U. S. 239, 247. Pp. 32–36.

(b) Under these cases, a State must provide procedural safeguards against an unlawful tax exaction because such exaction constitutes a deprivation of property under the Due Process Clause. A State may do so either by providing a form of predeprivation process—*e. g.*, by authorizing taxpayers to sue to enjoin imposition of the tax prior to its payment or to withhold payment and then interpose their objections as defenses in a state-initiated tax enforcement proceeding—or by providing retrospective relief as part of its postdeprivation procedure. Since Florida has established various financial sanctions and summary remedies to encourage liquor distributors to tender tax payments *before* resolution of any dispute over the tax's validity, the State does not provide a meaningful opportunity for predeprivation relief. Thus, in a postdeprivation refund action, the State must provide distributors not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a "clear and certain remedy," *O'Connor*, *supra*, at 285, for any erroneous or unlawful tax collection. Because the state courts did not invalidate Florida's liquor excise tax scheme in its entirety, but declared it unconstitutional only insofar as it discriminated against interstate commerce, the State is free to choose among several alternative courses in providing a meaningful remedy. It may refund to McKesson the difference between the tax it paid and the tax it would have been assessed were it extended the same rate reductions as its competitors. Cf. *Montana National Bank*, *supra*, and *Bennett*, *supra*. The State may also, to the extent consistent with other constitutional restrictions, assess and collect back taxes from McKesson's competitors who benefited from the rate reductions during the contested tax period, calibrating the retroactive assessment to create in hindsight a nondiscriminatory scheme. Cf. *id.*, at 247. Furthermore, the State may implement a combination of a partial refund to McKesson and a partial retroactive assessment of tax increases on favored competitors, so long as the resultant tax actually assessed during the contested period reflects a

nondiscriminatory scheme. However, the State may not, as respondents contend, deny McKesson retrospective relief on the theory that the highest tax rate would have been imposed on all distributors had the State known that the tax scheme actually enacted would be declared unconstitutional, such that McKesson would have paid the same tax in any event. Since this approach in fact treats McKesson worse than distributors of the favored local products, it is inconsistent with the requirement of due process: to place McKesson in a position equivalent to that actually occupied by the competitors so as to render valid the tax actually assessed. If, through the State's own choice of relief, McKesson ends up paying a smaller tax than it would have paid had the State initially imposed the highest rate on everyone, McKesson will not enjoy any unpalatable "windfall," but will merely be protected from the competitive economic disadvantage proscribed by the Commerce Clause. Pp. 36–43.

(c) Neither of the "equitable considerations" cited by the State Supreme Court is sufficient to override the constitutional requirement of retrospective relief. First, the court's observation that "the tax preference scheme [was] implemented . . . in good faith reliance on a presumptively valid statute" bespeaks a concern that an obligation to provide refunds for taxes collected pursuant to what later turns out to be an unconstitutional tax scheme would undermine the State's ability to engage in sound fiscal planning. But that ability is adequately secured by the State's freedom to impose various procedural requirements designed to allow it to predict with greater accuracy the availability of undisputed treasury funds; for example, it may specify by statute that refunds will be available only to those taxpayers paying under protest or providing some other timely notice of complaint, or it may refrain from collecting taxes pursuant to a scheme declared invalid by a competent tribunal pending further review. Florida's failure to avail itself of such methods of self-protection weakens any "equitable" justification for avoiding its constitutional obligation. Moreover, Florida's tax scheme could hardly be said to be a "presumptively valid statute," since it reflected only cosmetic changes from the prior tax scheme that itself was virtually identical to the one struck down in *Bacchus Imports*. Second, the state court's speculation that a refund would result in a "windfall" for McKesson, which has "likely passed on" the cost of the tax to its customers, is rejected in the context of this case. The tax injured McKesson not only because it left it poorer in an absolute sense than before (a problem that might be rectified to the extent the economic incidence of the tax was passed on to others), but also because it increased the price of McKesson's products as compared to the preferred local products, such that McKesson most likely lost sales to the favored distributors or else incurred other costs (*e. g.*, for advertising) in an effort to maintain its mar-

ket share. The State cannot persuasively claim that "equity" entitles it to retain tax moneys taken unlawfully from McKesson due to its pass-on of the tax where the pass-on itself furthers the very competitive disadvantage constituting the Commerce Clause violation that rendered the deprivation unlawful in the first place. *United States* v. *Jefferson Electric Mfg. Co.*, 291 U. S. 386, 402, distinguished. Pp. 44–49.

(d) The State's interests in avoiding serious economic and administrative dislocation and additional administrative costs may play a role in choosing the form of and fine-tuning the relief to be provided McKesson, though Florida's interest in financial stability does not justify a refusal to provide relief. Pp. 49–51.

524 So. 2d 1000, reversed and remanded.

BRENNAN, J., delivered the opinion for a unanimous Court.

David G. Robertson reargued the cause for petitioner. With him on the briefs was *Walter Hellerstein*.

H. Bartow Farr III reargued the cause for respondents. With him on the briefs were *Robert A. Butterworth*, Attorney General of Florida, *Joseph C. Mellichamp III*, Assistant Attorney General, and *Daniel C. Brown*, Special Assistant Attorney General.*

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*Briefs of *amici curiae* urging reversal were filed for the Crow Tribe of Indians by *Daniel M. Rosenfelt;* for the American Trucking Associations, Inc., et al. by *Andrew L. Frey, Kenneth S. Geller, Mark I. Levy, Andrew J. Pincus, Peter G. Kumpe, Daniel R. Barney, Robert Digges, Jr., Laurie T. Baulig,* and *William S. Busker;* for the Committee on State Taxation of the Council of State Chambers of Commerce by *Jean A. Walker* and *William D. Peltz;* for the Tax Executives Institute, Inc., by *Timothy J. McCormally;* and for U. S. Oil & Refining Co. by *Franklin G. Dinces.*

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *John K. Van de Kamp*, Attorney General of California, and *Richard F. Finn*, Supervising Deputy Attorney General, *Eric J. Coffill, Jim Jones*, Attorney General of Idaho, *Marc Racicot*, Attorney General of Montana, *Nicholas J. Spaeth*, Attorney General of North Dakota, *Jim Mattox*, Attorney General of Texas, *R. Paul Van Dam*, Attorney General of Utah, *Robert K. Corbin*, Attorney General of Arizona, *Warren Price III*, Attorney General of Hawaii, *Hubert H. Humphrey III*, Attorney General of Minnesota, and *Herbert O. Reid, Sr.*, Acting Corporation Counsel of the District of Columbia; for the State of Georgia et al. by *Mary Sue Terry*, Attorney General of Virginia, *H. Lane Kneedler*, Chief Deputy Attorney General, and *Walter A. McFarlane*, Deputy Attorney General, and by the

JUSTICE BRENNAN delivered the opinion of the Court.

Petitioner McKesson Corporation brought this action in Florida state court, alleging that Florida's liquor excise tax violated the Commerce Clause of the United States Constitution. The Florida Supreme Court agreed with petitioner that the tax scheme unconstitutionally discriminated against interstate commerce because it provided preferences for distributors of certain local products. Although the court enjoined the State from giving effect to those preferences in the future, the court also refused to provide petitioner a refund or any other form of relief for taxes it had already paid.

Our precedents establish that if a State penalizes taxpayers for failure to remit their taxes in timely fashion, thus requiring them to pay first and obtain review of the tax's validity later in a refund action, the Due Process Clause requires the State to afford taxpayers a meaningful opportunity to secure postpayment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional. We therefore agree with petitioner that the state court's decision denying such relief must be reversed.

I

For several decades until 1985, Florida's liquor excise tax scheme, which imposes taxes on manufacturers, distributors, and in some cases vendors of alcoholic beverages, provided

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Attorneys General for their respective jurisdictions as follows: *Michael J. Bowers* of Georgia, *William J. Guste, Jr.*, of Louisiana, *J. Joseph Curran, Jr.*, of Maryland, *Frank J. Kelley* of Michigan, *Michael Moore* of Mississippi, *Robert M. Spire* of Nebraska, *Brian McKay* of Nevada, *John P. Arnold* of New Hampshire, *Peter N. Perretti, Jr.*, of New Jersey, *Lacy H. Thornburg* of North Carolina, *Robert H. Henry* of Oklahoma, *Dave Frohnmayer* of Oregon, *T. Travis Medlock* of South Carolina, *Roger A. Tellinghuisen* of South Dakota, *Charles W. Burson* of Tennessee, *R. Paul Van Dam* of Utah, *Jeffrey L. Amestoy* of Vermont, and *Godfrey R. de Castro* of the Virgin Islands; for Caterpillar Inc. by *Don S. Harnack;* and for the National Conference of State Legislatures et al. by *Benna Ruth Solomon* and *Charles Rothfeld.*

for preferential treatment of beverages that were manufactured from certain "Florida-grown" citrus and other agricultural crops and then bottled in state. See, *e. g.*, Fla. Stat. §§ 564.02, 564.06, 565.12, 565.14 (1983). After this Court held in *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263 (1984), that a similar preference scheme employed by the State of Hawaii violated the Commerce Clause [1] (because it had both the purpose and effect of discriminating in favor of local products), the Florida Legislature revised its excise tax scheme and enacted the statutory provisions at issue in this litigation. See Fla. Stat. §§ 564.06, 565.12 (1989) (hereafter Liquor Tax). The legislature deleted the previous express preferences for "Florida-grown" products and replaced them with special rate reductions for certain specified citrus, grape, and sugarcane products, all of which are commonly grown in Florida and used in alcoholic beverages produced there.[2]

Petitioner McKesson Corporation is a licensed wholesale distributor of alcoholic beverages whose products did not qualify for the rate reductions.[3] Petitioner paid the appli-

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[1] "The Congress shall have Power . . . To regulate Commerce . . . among the several States." U. S. Const., Art. I, § 8, cl. 3.

[2] Under the Liquor Tax, the tax rate for each of several categories of preferred products is calculated according to a sliding scale. The rate varies directly with the total volume of such products sold by all distributors during the preceding month. If the volume of preferred products sold within any category is low, the tax rate is very favorable compared to the generally applicable rate for nonpreferred products. Conversely, at a relatively high volume of sales, the tax rate for preferred products equals the nonpreferred rate.

The Liquor Tax also contains "retaliation" provisions which declare that the rate reductions applicable to the preferred products do not apply when they are imported from a State that imposes discriminatory taxes or provides agricultural price supports or export subsidies benefiting its own locally produced alcoholic beverages. Fla. Stat. §§ 564.06(9), 565.12(1)(c), 565.12(2)(c) (1989).

[3] Florida law divides traffic in alcoholic beverages into three tiers: (1) manufacture or importation; (2) wholesale distribution; and (3) retail sales. § 561.14. Manufacturers may not sell directly to retail dealers, and dis-

cable taxes every month as required after the revised Liquor Tax went into effect, but in June 1986, petitioner filed an application with the Florida Office of the Comptroller seeking a refund on the ground that the tax scheme was unlawful. In September, after the Comptroller denied its application, petitioner (along with other distributors not present here) brought suit in Florida state court against respondents Division of Alcoholic Beverages and Tobacco, Department of Business Regulation, and Office of the Comptroller. Petitioner challenged the constitutionality of the tax under the Commerce Clause as well as under various other provisions of the United States and Florida Constitutions, and petitioner sought both declaratory and injunctive relief against the continued enforcement of the discriminatory tax scheme. Pursuant to Florida's "Repayment of Funds" statute, which provides for a refund of "[a]n overpayment of any tax, license or account due" and "[a]ny payment made into the State Treasury in error," §§ 215.26(1)(a), (c), and in apparent compliance with the statutory requisites for preserving a claim thereunder,[4] petitioner also sought a refund in the amount of

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tributors therefore serve as necessary intermediaries. The State places the legal incidence of the excise taxes on distributors, who must remit the taxes monthly. Distributors may choose to sell beverage products receiving the tax preferences, nonpreferred products, or both. §§ 561.50, 561.506, 565.13.

[4] The record is unclear whether and how, prior to petitioner's refund application to the Comptroller in September 1986, petitioner protested its tax payments or otherwise put the State on notice of its position that the Liquor Tax was unconstitutional. It appears, however, that Florida law does not require a taxpayer to pay under protest in order to preserve the right to challenge a remittance in a postpayment refund action, as long as the action is initiated within the applicable limitations period. See § 215.26 (2) (generally applicable 3-year limitations period for refund actions containing no protest requirement); *Miami* v. *Florida Retail Federation, Inc.*, 423 So. 2d 991, 993 (Fla. App. 1982) ("[T]he involuntary payment of an invalid tax, which has been promulgated without an authorized procedure for protest, presents no bar to recovery by a taxpayer who has paid without protest"). We assume for present purposes that petitioner satisfied

the excess taxes it had paid as a result of its disfavored treatment.

On petitioner's motion for partial summary judgment, the Florida trial court invalidated the discriminatory tax scheme on Commerce Clause grounds because the revised "legislation failed to surmount the constitutional violations addressed in *Bacchus [Imports, supra].*" App. 263. The trial court enjoined future enforcement of the preferential rate reductions, leaving all distributors subject to the Liquor Tax's nonpreferred rates. The court, however, declined to order a refund or any other form of relief for the taxes previously paid and timely challenged under the discriminatory scheme. The court's order of prospective relief was stayed pending respondents' appeal of the Commerce Clause ruling to the Florida Supreme Court.[5]

Petitioner McKesson cross-appealed the trial court's ruling, arguing that as a matter of both federal and state law it was entitled at least to "a refund of the difference between the disfavored product's tax rate and the favored product's tax rate." 524 So. 2d 1000, 1009 (1988). The State Supreme

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whatever protest requirements might exist, though as we explain, *infra*, at 45, upon remand the State may invoke, as an independent basis for refusing to provide a refund, petitioner's failure to comply with a notice requirement that was in effect at the time of petitioner's tax payments.

[5] The appeal and cross-appeal were certified directly to the Florida Supreme Court by the District Court of Appeal.

The State's immediate filing of its Notice of Appeal automatically stayed the trial court's order. Fla. Rule App. Proc. 9.310(b)(2). Petitioner requested the trial court to vacate the stay, arguing that continued enforcement of the unconstitutional tax scheme pending State Supreme Court review would continue to expose Florida's treasury to claims for tax refunds. After a hearing, the trial court denied the motion. Pending the State Supreme Court's final decision, therefore, respondents continued to collect taxes under the Liquor Tax with the unconstitutional preferences still in effect.

Hence, in this case petitioner contests the validity of the taxes it paid from July 1985 until the State Supreme Court's final decision was given effect in February 1988 (the contested tax period).

Court affirmed the trial court's ruling that the Liquor Tax unconstitutionally discriminated against interstate commerce and upheld the trial court's order that the preferential rate reductions be given no future operative effect. The Supreme Court also affirmed the trial court's refusal to order a tax refund, declaring that "the prospective nature of the rulings below was proper in light of the equitable considerations present in this case." *Id.*, at 1010. The court noted that the Division of Alcoholic Beverages and Tobacco had collected the Liquor Tax in "good faith reliance on a presumptively valid statute." *Ibid.* Moreover, the court suggested that, "if given a refund, [petitioner] would in all probability receive a windfall, since the cost of the tax has likely been passed on to [its] customers." *Ibid.*

After petitioner's request for rehearing was denied, petitioner filed a petition for writ of certiorari in this Court, presenting the question whether federal law entitles it to a partial tax refund. We granted the petition, 488 U. S. 954 (1988), and consolidated the case with *American Trucking Assns., Inc.* v. *Smith*, No. 88–325, which we also decide today.[6] *Post*, p. 167.

II

Respondents first ask us to hold that, though the Florida courts accepted jurisdiction over this suit which sought monetary relief from various state entities, the Eleventh Amendment[7] nevertheless precludes our exercise of appellate jurisdiction in this case. We reject respondents' suggestion. Almost 170 years ago, Chief Justice Marshall, writing for the Court, rejected a State's Eleventh Amendment challenge to

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[6] Both cases were argued in October Term 1988 and then reargued in October Term 1989 after supplemental briefing was requested. 492 U. S. 915 (1989).

[7] "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U. S. Const., Amdt. 11.

this Court's power on writ of error to review the judgment of a state court involving an issue of federal law. See *Cohens* v. *Virginia*, 6 Wheat. 264, 412 (1821). Although *Cohens* involved a proceeding commenced in the first instance by the State itself against a citizen, such that the Court's holding might be read as limited to that circumstance, the decision has long been understood as supporting a broader proposition: "[I]t was long ago settled that a writ of error to review the final judgment of a state court, even when a State is a formal party [defendant] and is successful in the inferior court, is not a suit within the meaning of the Amendment." *General Oil Co.* v. *Crain*, 209 U. S. 211, 233 (1908) (Harlan, J., concurring); see also *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 585 (1837) (Story, J., dissenting). Our consistent practice since *Cohens* confirms this broader understanding. We have repeatedly and without question accepted jurisdiction to review issues of federal law arising in suits brought against States in state court; indeed, we frequently have entertained cases analogous to this one, where a taxpayer who had brought a refund action in state court against the State asked us to reverse an adverse state judicial decision premised upon federal law.[8]

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[8] See, *e. g.*, *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803 (1989); *Texas Monthly, Inc.* v. *Bullock*, 489 U. S. 1 (1989); *Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, 483 U. S. 232 (1987); *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221 (1987); *Williams* v. *Vermont*, 472 U. S. 14 (1985); *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263 (1984); *Aloha Airlines, Inc.* v. *Director of Taxation of Hawaii*, 464 U. S. 7 (1983); *Exxon Corp.* v. *Eagerton*, 462 U. S. 176 (1983); *Central Machinery Co.* v. *Arizona Tax Comm'n*, 448 U. S. 160 (1980); *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136 (1980); *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U. S. 64 (1963); *Laurens Federal Savings & Loan Assn.* v. *South Carolina Tax Comm'n*, 365 U. S. 517 (1961); *Memphis Steam Laundry Cleaner, Inc.* v. *Stone*, 342 U. S. 389 (1952); *Best & Co.* v. *Maxwell*, 311 U. S. 454 (1940); *Iowa-Des Moines National Bank* v. *Bennett*, 284 U. S. 239 (1931); *International Paper Co.* v. *Massachusetts*, 246 U. S. 135 (1918); *State Tonnage Tax Cases*, 12 Wall. 204 (1871); cf. *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S.

Respondents correctly note that, since *Cohens*, the effect of the Eleventh Amendment on this Court's appellate jurisdiction over cases arising in state court has only infrequently been discussed in our cases. But those discussions uniformly reveal an understanding that the Amendment does not circumscribe our appellate review of state-court judgments.[9] Moreover, that this Court has had little occasion to discuss the issue merely reflects the extent to which States, though frequently interjecting Eleventh Amendment objections to suits initiated against them in federal court, have understood the time-honored practice of appellate review of state-court judgments to be consistent with this Court's role in our federal system. "[I]t is plain that the framers of the constitution did contemplate that cases within the judicial cognizance of the United States not only might but would arise in the state courts, in the exercise of their ordinary jurisdiction." *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 340 (1816).[10] To

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707 (1981) (reversing state-court decision against claimant in suit against state entity seeking payment of unemployment benefits); *Bonelli Cattle Co.* v. *Arizona*, 414 U. S. 313 (1973) (reversing state-court decision against claimant in suit against State seeking to quiet title).

[9] In several recent cases, we have exercised appellate jurisdiction to review issues of federal law arising in suits brought against States or state entities in state court even after noting that the Eleventh Amendment would have precluded federal jurisdiction as an original matter. See, *e. g.*, *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58, 65, n. 5 (1989) ("Had the present § 1983 action been brought in federal court," the District Court would have "dismissed the plaintiff's damages claim as barred by the Eleventh Amendment"); *Maine* v. *Thiboutot*, 448 U. S. 1, 9, n. 7 (1980) ("[N]o Eleventh Amendment question is present, of course, where an action is brought in a state court"); cf. *Nevada* v. *Hall*, 440 U. S. 410, 420 (1979) (exercising appellate jurisdiction over action brought in state court against State but noting that the Eleventh Amendment "places explicit limits on the powers of federal courts to entertain suits against a State").

[10] See also *Tafflin* v. *Levitt*, 493 U. S. 455, 458 (1990) ("[S]tate courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States"); The Federalist No. 82, p. 555 (J. Cooke ed. 1961) (A. Hamilton) ("[I]n every case in which [state courts] were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which

secure state-court compliance with, and national uniformity of, federal law, the exercise of jurisdiction by state courts over cases encompassing issues of federal law is subject to two conditions: State courts must interpret and enforce faithfully the "supreme Law of the Land,"[11] and their decisions are subject to review by this Court.[12] Whereas the Eleventh

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those acts may give birth. . . . [T]he inference seems to be conclusive that the state courts would have a concurrent jurisdiction in all cases arising under the laws of the union, where it was not expressly prohibited").

[11] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the contrary notwithstanding." U. S. Const., Art. VI.

[12] "Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them . . . . If they fail therein, and withhold or deny rights, privileges, or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the State in which the question could be decided to this court for final and conclusive determination." *Robb* v. *Connolly*, 111 U. S. 624, 637 (1884). See also *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673, 681 (1930) ("[T]he plaintiff's claim is one arising under the Federal Constitution and, consequently, one on which the opinion of the state court is not final"); *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 347–348 (1816) (plenary appellate jurisdiction of Supreme Court motivated in part by "the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution"). In *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234 (1985), the Court responded to the dissent's concern that state courts might inadequately protect federal rights despite the Supremacy Clause by adverting to the dissent's description, *id.*, at 256, n. 8, of a "longstanding, though unarticulated, rule that the Eleventh Amendment does not limit exercise of otherwise proper federal *appellate* jurisdiction over suits [against States] from state courts." *Id.*, at 240, n. 2.

Of course, though the Eleventh Amendment does not constrain this Court's appellate jurisdiction over such suits, appellate jurisdiction may be constrained for other reasons not apposite here. For example, a state-court judgment would be unreviewable were it to rest on an independent

Amendment has been construed so that a State retains immunity from original suit in federal court, see *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 237–240 (1985), it is "inherent in the constitutional plan," *Monaco* v. *Mississippi*, 292 U. S. 313, 329 (1934), that when a state court takes cognizance of a case, the State assents to appellate review by this Court of the federal issues raised in the case "whoever may be the parties to the original suit, whether private persons, or the state itself."[13] We recognize what has long been im-

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and adequate state-law ground. See *Michigan* v. *Long*, 463 U. S. 1032, 1038, n. 4 (1983).

[13] *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 585 (1837) (Story, J., dissenting), citing *Cohens* v. *Virginia*, 6 Wheat. 264 (1821).

For example, in *Smith* v. *Reeves*, 178 U. S. 436 (1900), the Court dismissed a suit brought in federal court by an aggrieved taxpayer seeking a refund for a State's illegal assessment. We explained, however, that the State's decision to consent to suit only in state, but not federal, court is "subject always to the condition, arising out of the supremacy of the Constitution of the United States and the laws made in pursuance thereof, that the final judgment of the highest court of the State in any action brought against it with its consent may be reviewed or reexamined [by this Court], as prescribed by the act of Congress, if it denies to the plaintiff any right, title, privilege or immunity secured to him and specially claimed under the Constitution or laws of the United States." *Id.*, at 445.

Similarly, in *Chandler* v. *Dix*, 194 U. S. 590 (1904), the Court dismissed a quiet title suit brought in federal court by a citizen with respect to lands that had been taken by a State and sold to recoup compensation for certain tax deficiencies. The Court found that the State was a necessary party defendant and that the Eleventh Amendment barred initiation of the suit in federal court. The Court simultaneously declared, however, that "[o]f course, a taxpayer denied rights secured to him by the Constitution and laws of the United States, and specially set up by him, could bring the case here [to the Supreme Court] by writ of error from the highest courts of the State." *Id.*, at 592. See also *Rosewell* v. *LaSalle National Bank*, 450 U. S. 503, 515–516, n. 19 (1981) (under state tax refund scheme, "a taxpayer may raise all constitutional objections, including those based on the State's failure to pay interest or to return all unconstitutionally collected taxes, in the [state] legal refund proceeding, . . . after which the litigants have an opportunity to seek review in this Court").

plicit in our consistent practice and uniformly endorsed in our cases: The Eleventh Amendment does not constrain the appellate jurisdiction of the Supreme Court over cases arising from state courts. Accordingly, we turn to the merits of petitioner's claim.

III

It is undisputed that the Florida Supreme Court, after holding that the Liquor Tax unconstitutionally discriminated against interstate commerce because of its preferences for liquor made from "'crops which Florida is adapted to growing,'" 524 So. 2d, at 1008, acted correctly in awarding petitioner declaratory and injunctive relief against continued enforcement of the discriminatory provisions. The question before us is whether prospective relief, by itself, exhausts the requirements of federal law. The answer is no: If a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment[14] obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.[15]

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[14] "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U. S. Const., Amdt. 14, § 1.

[15] Respondents do not question the Florida Supreme Court's holding that the Liquor Tax violated the Commerce Clause. And it is clear that, under the approaches advanced today in *American Trucking Assns., Inc.* v. *Smith*, *post*, p. 167, the Florida Supreme Court's holding governs the validity of respondents' taxation of petitioner prior to the date of the court's decision. Under JUSTICE O'CONNOR's approach, see *post*, at 177–178, the Florida court's decision applies retroactively because it rested on established principles of Commerce Clause jurisprudence. See *infra*, at 45–46. Under JUSTICE STEVENS' approach, *post*, at 212–218, the Florida court's decision, like all judicial decisions, applies retroactively. See also JUSTICE SCALIA's separate opinion, *post*, at 204–205; the circumstances present in that case warranting in his view a departure from *stare decisis* are not present here.

A

We have not had occasion in recent years to explain the scope of a State's obligation to provide retrospective relief as part of its postdeprivation procedure in cases such as this.[16] Our approach today, however, is rooted firmly in precedent dating back to at least early this century. *Atchison, T. & S. F. R. Co.* v. *O'Connor*, 223 U. S. 280 (1912), involved a suit by a railroad company to recover taxes it had paid under protest, alleging that the tax scheme violated the Commerce Clause because most of the franchise tax was apportioned to business conducted wholly outside the State. The Court agreed that the franchise tax was unconstitutional and concluded that the railroad company was entitled to a refund of the portion of the tax imposed on out-of-state activity. Justice Holmes explained:

> "It is reasonable that a man who denies the legality of a tax should have a clear and certain remedy. The rule being established that apart from special circumstances he cannot interfere by injunction with the State's collection of its revenues, an action at law to recover back what he has paid is the alternative left. Of course we are speaking of those cases where the State is not put to an action if the citizen refuses to pay. In these latter he can interpose his objections by way of defence, but when, as is common, the State has a more summary remedy, such as distress, and the party indicates by protest that he is yielding to what he cannot prevent, courts sometimes perhaps have been a little too slow to recognize the implied duress under which payment is made.

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[16] In the recent past, after invalidating a state tax scheme on Commerce Clause grounds, we have left state courts with the initial duty upon remand of crafting appropriate relief in accord with both federal and state law. See, *e. g.*, *American Trucking Assns., Inc.* v. *Scheiner*, 483 U. S. 266, 297–298 (1987); *Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, 483 U. S., at 251–253; *Williams* v. *Vermont*, 472 U. S., at 28; *Bacchus Imports*, 468 U. S., at 277.

> But even if the State is driven to an action, if at the same time the citizen is put at a serious disadvantage in the assertion of his legal, in this case of his constitutional, rights, by defence in the suit, justice may require that he should be at liberty to avoid those disadvantages by paying promptly and bringing suit on his side." *Id.*, at 285–286.

After finding that the railroad company's tax payment "was made under duress," *id.*, at 287, the Court issued a judgment entitling the company to a "refunding of the tax." *Ibid.* Thus was the taxpayer provided a "clear and certain remedy" for the State's unlawful extraction of tax moneys under duress.

In *Ward* v. *Love County Board of Comm'rs*, 253 U. S. 17 (1920), we reversed the Oklahoma Supreme Court's refusal to award a refund for an unlawful tax. A subdivision of the State sought to tax lands allotted by Congress to members of the Choctaw and Chickasaw Indian Tribes despite a provision of the allotment treaty making the "'lands allotted . . . nontaxable while the title remains in the original allottee, but not to exceed twenty-one years from date of patent.'" *Id.*, at 19, quoting Act of June 28, 1898, § 29, 30 Stat. 507. To avoid a distress sale of its lands, the Choctaw Tribe paid the taxes under protest and then brought suit in state court to obtain a refund. We observed that "it is certain that the lands were nontaxable" by the State and its subdivisions under the allotment treaty and, therefore, the taxes were assessed in violation of federal law. 253 U. S., at 21. After finding that the Tribe paid the taxes under duress, *id.*, at 23, we ordered a refund. We explained the State's duty to remit the tax as follows:

> "To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law. Of

course this would be in contravention of the Fourteenth Amendment, which binds the county as an agency of the State." *Id.*, at 24.

See also *Carpenter* v. *Shaw*, 280 U. S. 363, 369 (1930) (holding, in a case analogous to *Ward*, that "a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment").

In *Montana National Bank of Billings* v. *Yellowstone County*, 276 U. S. 499 (1928), we applied the same due process analysis to a tax that was unlawful because it was *discriminatory*, though otherwise within the State's power to impose. Montana officials had imposed a tax on shares of banks incorporated under federal law but not on shares of state-incorporated banks, relying on a Montana Supreme Court decision interpreting state law to preclude such taxation of state bank shares. The Montana National Bank of Billings paid its tax under protest and then brought suit for a refund. The bank contended that the different tax treatment violated § 5219 of the Revised Statutes, a federal statute requiring equal taxation of the shares of state and national banks. On appeal, the Montana Supreme Court overruled its previous interpretation of state law and held that thereafter shares of state banks could also be taxed, thus enabling state officials to comply with § 5219. *Montana National Bank of Billings* v. *Yellowstone County*, 78 Mont. 62, 252 P. 876 (1926). The court declined, however, to order a refund of the taxes that the Montana National Bank of Billings had paid during the period when state officials had exempted state banks in reliance on the court's earlier decision. *Id.*, at 86, 252 P., at 883. On writ of error, this Court acknowledged that the Montana Supreme Court's decision to overrule its previous interpretation of state law ensured for the future the equal treatment demanded by federal law. The Court noted, however, that prospective relief alone "d[id] not cure the mischief which had been done under the

earlier construction." 276 U. S., at 504. We held that the Montana National Bank of Billings "c[ould not] be deprived of its legal right to recover the amount of the tax unlawfully exacted of it by the later [Montana Supreme Court] decision which, while repudiating the construction under which the unlawful exaction was made, le[ft] the monies thus exacted in the public treasury," *id.*, at 504–505, and therefore the bank enjoyed "an undoubted right to recover" the moneys it had paid. *Id.*, at 504.

The Court in *Montana National Bank* recognized that the federal mandate of equal treatment could have been satisfied by collecting back taxes from state banks rather than by granting a refund to national banks. *Id.*, at 505. But as to this possibility, the Court remarked:

> "[I]t is unnecessary to say more than that it nowhere appears that these [taxing] officers, if they possess the power [to assess back taxes], have undertaken to exercise it or that they have any intention of ever doing so. It will be soon enough to invite consideration of this purely speculative suggestion when, if ever, the taxing officials shall have put it into practical effect." *Ibid.*

Montana National Bank thus held that one forced to pay a discriminatorily high tax in violation of federal law is entitled, in addition to prospective relief, to a refund of the excess tax paid—at least unless the disparity is removed in some other manner.

We again applied this analysis to a discriminatory tax in *Iowa-Des Moines National Bank* v. *Bennett*, 284 U. S. 239 (1931). The Court held unanimously that the State of Iowa's taxation of the shares of state and national banks at a higher rate than those of competing domestic corporations violated the Equal Protection Clause. *Id.*, at 245–246. With respect to the banks' claim for a refund of excess taxes paid, Justice Brandeis explained:

> "The [banks'] rights were violated, and the causes of action arose, when taxes at the lower rate were collected from their competitors. It may be assumed that all ground for a claim for refund would have fallen if the State, promptly upon discovery of the discrimination, had removed it by collecting the additional taxes from the favored competitors. By such collection the [banks'] grievances would have been redressed, for these are not primarily overassessment. The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced." *Id.*, at 247.

But the State did not elect to set matters right by collecting additional taxes from the banks' competitors for the four tax years encompassed by the suit. And the Court found it "well settled" that the banks could not be "remitted to the necessity of awaiting such action by the state officials upon their own initiative." *Ibid.* The Court held, therefore, that the banks were "entitled to obtain in these suits refund of the excess of taxes exacted from them." *Ibid.*

B

These cases demonstrate the traditional legal analysis appropriate for determining Florida's constitutional duty to provide relief to petitioner McKesson for its payment of an unlawful tax. Because exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause.[17] The State may choose to provide a form of "predeprivation process," for example, by authorizing taxpayers to bring suit to enjoin imposition of a

[17] See, *e. g.*, *Mathews* v. *Eldridge*, 424 U. S. 319, 333 (1976) ("This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest"); *Central of Georgia R. Co.* v. *Wright*, 207 U. S. 127, 138–142 (1907); *Davidson* v. *New Orleans*, 96 U. S. 97, 104–105 (1878).

tax prior to its payment, or by allowing taxpayers to withhold payment and then interpose their objections as defenses in a tax enforcement proceeding initiated by the State. However, whereas "[w]e have described 'the root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest,'" *Cleveland Bd. of Education* v. *Loudermill*, 470 U. S. 532, 542 (1985) (citation omitted), it is well established that a State need not provide predeprivation process for the exaction of taxes.[18] Allowing taxpayers to litigate their tax liabilities prior to payment might threaten a government's financial security, both by creating unpredictable interim revenue shortfalls against which the State cannot easily prepare, and by making the ultimate collection of validly imposed taxes more difficult.[19] To protect government's exceedingly strong interest in financial stability in this context, we have long held that a State may employ various financial sanctions and summary remedies, such as distress sales, in order to encourage taxpayers to make timely payments prior to resolution of any dispute over the validity of the tax assessment.

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[18] See, *e. g.*, *Bob Jones University* v. *Simon*, 416 U. S. 725, 746 (1974); *Phillips* v. *Commissioner*, 283 U. S. 589, 595–597 (1931); *Dodge* v. *Osborn*, 240 U. S. 118, 122 (1916).

[19] See, *e. g.*, *California* v. *Grace Brethren Church*, 457 U. S. 393, 410 (1982) ("'During [prepayment litigation] the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency'"), quoting *Perez* v. *Ledesma*, 401 U. S. 82, 128, n. 17 (1971) (BRENNAN, J., concurring in part and dissenting in part); *Dows* v. *City of Chicago*, 11 Wall. 108, 110 (1871) ("It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public").

Florida has availed itself of this approach, establishing various sanctions and summary remedies designed so that liquor distributors tender tax payments *before* their objections are entertained and resolved.[20] As a result, Florida does not purport to provide taxpayers like petitioner with a meaningful opportunity to withhold payment and to obtain a predeprivation determination of the tax assessment's validity;[21] rather, Florida requires taxpayers to raise their objections to

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[20] If a distributor fails to pay the tax on time, the Division of Alcoholic Beverages and Tobacco may issue a warrant which, when filed in a local circuit court, directs the county sheriff to levy upon and sell the delinquent taxpayer's goods and chattels to recover the amount of the unpaid tax plus a penalty of 50%, along with interest of 1% per month and the costs of executing the warrant. Fla. Stat. § 210.14(1) (1989). In addition, the Division may revoke, § 561.29(1)(a), or decline to renew, § 561.24(5), a distributor's license for failure to abide by Florida law, including the statutory requirement that the Liquor Tax be timely paid.

[21] We have long held that, when a tax is paid in order to avoid financial sanctions or a seizure of real or personal property, the tax is paid under "duress" in the sense that the State has not provided a fair and meaningful predeprivation procedure. See, *e. g.*, *United States* v. *Mississippi Tax Comm'n*, 412 U. S. 363, 368 (1973) (economic sanctions for nonpayment); *Ward* v. *Love County Board of Comm'rs*, 253 U. S. 17, 23 (1920) (distress sale of land); *Gaar, Scott & Co.* v. *Shannon*, 223 U. S. 468, 471 (1912) (both). Justice Holmes suggested in *Atchison, T. & S. F. R. Co.* v. *O'Connor*, 223 U. S. 280 (1912), that a taxpayer pays "under duress" when he proffers a timely payment merely to avoid a "serious disadvantage in the assertion of his legal . . . rights" should he withhold payment and await a state enforcement proceeding in which he could challenge the tax scheme's validity "by defence in the suit." *Id.*, at 286.

In contrast, if a State chooses not to secure payments under duress and instead offers a meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing, payments tendered may be deemed "voluntary." The availability of a predeprivation hearing constitutes a procedural safeguard against unlawful deprivations sufficient by itself to satisfy the Due Process Clause, and taxpayers cannot complain if they fail to avail themselves of this procedure. See *Mississippi Tax Comm'n*, *supra*, at 368, n. 11 ("[W]here voluntary payment [of a tax] is knowingly made pursuant to an illegal demand, recovery of that payment may be denied").

the tax in a postdeprivation refund action. To satisfy the requirements of the Due Process Clause, therefore, in this refund action the State must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation,[22] but also a "clear and certain remedy," *O'Connor*, 223 U. S., at 285, for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one.

Had the Florida courts declared the Liquor Tax invalid either because (other than its discriminatory nature) it was beyond the State's power to impose, as was the unapportioned tax in *O'Connor*, or because the taxpayers were absolutely immune from the tax, as were the Indian Tribes in *Ward* and *Carpenter*, no corrective action by the State could cure the invalidity of the tax during the contested tax period. The State would have had no choice but to "undo" the unlawful deprivation by refunding the tax previously paid under duress, because allowing the State to "collect these unlawful taxes by coercive means and not incur any obligation to pay them back . . . would be in contravention of the Fourteenth Amendment." *Ward*, 253 U. S., at 24; see also *Carpenter*, 280 U. S., at 369.

Here, however, the Florida courts did not invalidate the Liquor Tax in its entirety; rather, they declared the tax scheme unconstitutional only insofar as it operated in a manner that discriminated against interstate commerce. The State may, of course, choose to erase the property deprivation itself by providing petitioner with a full refund of its tax payments. But as both *Montana National Bank* and *Bennett* illustrate, a State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this

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[22] See n. 17, *supra;* see also, *e. g.*, *Mathews*, 424 U. S., at 333 ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'") (citation omitted). The adequacy of this aspect of Florida's postdeprivation procedure is not in dispute.

determination. Florida may reformulate and enforce the Liquor Tax during the contested tax period in any way that treats petitioner and its competitors in a manner consistent with the dictates of the Commerce Clause. Having done so, the State may retain the tax appropriately levied upon petitioner pursuant to this reformulated scheme because this retention would deprive petitioner of its property pursuant to a tax scheme that is *valid* under the Commerce Clause. In the end, the State's postdeprivation procedure would provide petitioner with all of the process it is due: an opportunity to contest the validity of the tax and a "clear and certain remedy" designed to render the opportunity meaningful by preventing any permanent unlawful deprivation of property.

More specifically, the State may cure the invalidity of the Liquor Tax by refunding to petitioner the difference between the tax it paid and the tax it would have been assessed were it extended the same rate reductions that its competitors actually received. Cf. *Montana National Bank* and *Bennett* (curing discrimination through such refunds). Alternatively, to the extent consistent with other constitutional restrictions, the State may assess and collect back taxes from petitioner's competitors who benefited from the rate reductions during the contested tax period, calibrating the retroactive assessment to create in hindsight a nondiscriminatory scheme. Cf. *Bennett*, 284 U. S., at 247 (suggesting State could erase the unconstitutional discrimination by "collecting the additional taxes from the favored competitors").[23] Fi-

[23] We previously have held that the retroactive assessment of a tax increase does not necessarily deny due process to those whose taxes are increased, though beyond some temporal point the retroactive imposition of a significant tax burden may be "so harsh and oppressive as to transgress the constitutional limitation," depending on "the nature of the tax and the circumstances in which it is laid." *Welch* v. *Henry*, 305 U. S. 134, 147 (1938). See *United States* v. *Hemme*, 476 U. S. 558 (1986); *United States* v. *Darusmont*, 449 U. S. 292 (1981); cf. *United States* v. *Sperry Corp.*, 493 U. S. 52, 65 (1989) ("It is surely proper for Congress to legislate retrospectively to ensure that costs of a program are borne by the entire class of

nally, a combination of a partial refund to petitioner and a partial retroactive assessment of tax increases on favored competitors, so long as the resultant tax actually assessed during the contested tax period reflects a scheme that does not discriminate against interstate commerce, would render petitioner's resultant deprivation lawful and therefore satisfy the Due Process Clause's requirement of a fully adequate postdeprivation procedure.

Respondents suggest that, in order to redress fully petitioner's unconstitutional deprivation, the State need not *actually* impose a constitutional tax scheme retroactively on all distributors during the contested tax period. Rather, they claim, the State need only place petitioner in the same tax position that petitioner *would have been placed* by such a hypothetical scheme. Specifically, respondents contend that the State, had it known that the Liquor Tax would be declared unconstitutional, would have imposed the higher flat tax rate on all distributors. Because petitioner would have paid the same tax under this hypothetical scheme as it did under the Liquor Tax, respondents claim that petitioner is not entitled to any retrospective relief (at least in the form of a refund);

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persons that Congress rationally believes should bear them"); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 16 (1976) ("[L]egislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. This is true even though the effect of the legislation is to impose a new duty or liability based on past acts") (citations omitted).

Because we do not know whether the State will choose in this case to assess and collect back taxes from previously favored distributors, we need not decide whether this choice would violate due process by unduly interfering with settled expectations.

Should the State choose this remedial alternative, the State's effort to collect back taxes from previously favored distributors may not be perfectly successful. Some of these distributors, for example, may no longer be in business. But a good-faith effort to administer and enforce such a retroactive assessment likely would constitute adequate relief, to the same extent that a tax scheme would not violate the Commerce Clause merely because tax collectors inadvertently missed a few in-state taxpayers.

such relief would confer a "windfall" on petitioner by leaving it with a smaller tax burden than it would have borne were there no Commerce Clause violation in the first place.

We implicitly rejected this line of reasoning in *Montana National Bank* and *Bennett*, and we expressly do so today. Even aside from the contrived and self-serving nature of the baseline against which respondents propose to measure petitioner's "deprivation,"[24] respondents' approach is inconsistent with the nature of the State's due process obligation. The deprivation worked by the Liquor Tax violated the Commerce Clause because the tax scheme's purpose and effect was to impose a relative disadvantage on a category of distributors (those dealing with nonpreferred products) largely composed of out-of-state companies, not because its treatment of this category of distributors diverged from some fixed substantive norm.[25] Hence, the salient feature of the position petitioner "should have occupied" absent any Commerce Clause violation is its equivalence to the position actually occupied by petitioner's favored competitors.

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[24] Whether the State would have taxed all distributors at the highest rate authorized by the Liquor Tax depends upon counterfactual assumptions regarding the many complex variables that affect legislative judgment, and therefore respondents' prediction is not easily proved. It is quite possible, for example, that had the legislature been unable to enact the discriminatory Liquor Tax, the legislature instead would have extended universally the lower tax rate because it would have preferred to keep to a minimum the absolute economic burden on Florida growers of the preferred products as well as on the (mostly in-state) distributors of those products—even though this particular aspect of the tax scheme would generate less total revenue.

[25] The Florida Supreme Court noted that "[i]t is undisputed that manufacturers and distributors of beverages which qualify for preferential treatment under [the Liquor Tax] are in direct competition with manufacturers and distributors of alcoholic beverages which do not. . . . With these facts in mind it becomes quite apparent that . . . Florida's alcoholic beverage tax scheme clearly raises the relative cost of doing business for a manufacturer or distributor of alcoholic beverages which are not made from base crops which are 'adapted to growing in Florida.'" 524 So. 2d 1000, 1008 (1988).

But the State's offer to restore petitioner only to the same *absolute* tax position it would have enjoyed if taxed according to a "hypothetical" nondiscriminatory scheme does not in hindsight avoid the unlawful deprivation: It still in fact treats petitioner worse than distributors using the favored local products, thereby perpetuating the Commerce Clause violation during the contested tax period. Respondents are therefore correct that petitioner's "claim for a refund thus asks for much more than prompt injunctive relief would have achieved"[26] only in the narrow sense that petitioner's absolute tax burden might be lower after the refund than if the tax preferences had immediately been enjoined such that all distributors were taxed at the higher rates. However, only an *actual* refund (or other retroactive adjustment of the tax burdens borne by petitioner and/or its favored competitors during the contested tax period) can bring about the *nondiscrimination* that "prompt injunctive relief would have achieved." If, through the State's own choice of relief, petitioner ends up paying a smaller tax than it would have paid if the State initially had imposed the highest rate on everyone, petitioner would not enjoy an unpalatable "windfall." Rather, petitioner would merely be protected from the comparative economic disadvantage proscribed by the Commerce Clause. Hence, the State's duty under the Due Process Clause to provide a "clear and certain remedy" requires it to ensure that the tax as *actually imposed* on petitioner and its competitors during the contested tax period does not deprive petitioner of tax moneys in a manner that discriminates against interstate commerce.[27]

[26] Brief for Respondents on Rearg. 15.

[27] Respondents also assert that no refund is appropriate because petitioner most likely would pay the same amount of tax even if the *preferred* sliding scale tax schedules were retroactively extended to petitioner. As explained earlier, see n. 2, *supra*, the tax rate on preferred products under the Liquor Tax varies with the total volume of such products sold. Respondents suggest that, were the sliding scale schedule applied to petitioner, then "the gallons of alcoholic beverages sold by petitioner (and the

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The Florida Supreme Court cites two "equitable considerations" as grounds for providing petitioner only prospective relief, but neither is sufficient to override the constitutional requirement that Florida provide retrospective relief as part of its postdeprivation procedure. The Florida court first mentions that "the tax preference scheme [was] implemented by the [Division of Alcoholic Beverages and Tobacco] in good faith reliance on a presumptively valid statute." 524 So. 2d, at 1010. This observation bespeaks a concern that a State's obligation to provide refunds for what later turns out to be an unconstitutional tax would undermine the State's ability to engage in sound fiscal planning. However, leaving aside the

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other distributors who previously paid the generally-applicable tax) [would have to be] included in the calculation" of the appropriate tax rate. Brief for Respondents 28. Cf. *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U. S. 702, 719–720, n. 36 (1978) (suggesting that it would be within district court's equitable discretion, when devising remedy for Title VII violation arising from sex-based determination of insurance premiums, to determine appropriate relief based on recalculation of the premium required for an actuarially sound and nondiscriminatory insurance plan). Were the total volume of all sales included in the rate calculation, "it is virtually certain that the maximum rates under the scales would routinely apply. . . . It appears highly likely, therefore, that petitioner would owe the same amount of tax." Brief for Respondents 28.

We agree with respondents that the State might remedy the invalidity of petitioner's deprivation by extending to petitioner the sliding scale schedule in a nondiscriminatory fashion—but respondents' proposal would appear not to accomplish this result. If, as proposed, the State were to calculate the tax rate applicable to petitioner based on the total volume of sales of both preferred and nonpreferred goods, but leave untouched the taxes actually collected from the favored distributors based on the volume of sales of only preferred goods, the resulting tax scheme would itself raise questions under the Commerce Clause due to the State's use of a different "volume" variable for the preferred and nonpreferred goods in a manner that clearly disadvantages the latter. In order to cure the illegality of the tax as originally imposed, the State must ultimately collect a tax for the contested tax period that in no respect impermissibly discriminates against interstate commerce.

fact that the State might avoid any such disruption by choosing (consistent with constitutional limitations) to collect back taxes from favored distributors rather than to offer refunds, we do not find this concern weighty in these circumstances. A State's freedom to impose various procedural requirements on actions for postdeprivation relief sufficiently meets this concern with respect to future cases. The State might, for example, provide by statute that refunds will be available only to those taxpayers paying under protest or providing some other timely notice of complaint; execute any refunds on a reasonable installment basis; enforce relatively short statutes of limitations applicable to such actions;[28] refrain from collecting taxes pursuant to a scheme that has been declared invalid by a court or other competent tribunal pending further review of such declaration on appeal; and/or place challenged tax payments into an escrow account or employ other accounting devices such that the State can predict with greater accuracy the availability of undisputed treasury funds. The State's ability in the future to invoke such procedural protections suffices to secure the State's interest in stable fiscal planning when weighed against its constitutional obligation to provide relief for an unlawful tax.

And in the present case, Florida's failure to avail itself of certain of these methods of self-protection weakens any "equitable" justification for avoiding its constitutional obligation to provide relief.[29] Moreover, even were we to assume that

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[28] See *Ward* v. *Love County Board of Comm'rs*, 253 U. S., at 25 (recognizing refund claim could be barred if there was "any valid local [limitations] law in force when the claim was filed"); see also Fla. Stat. § 215.26(2) (1989) (generally applicable 3-year limitations period for tax refund actions).

[29] For example, even after the Florida trial court held that the Liquor Tax violated the Commerce Clause and enjoined the tax preferences for local products, the State did not join petitioner's motion to vacate the stay automatically imposed pending appeal, thus continuing the unconstitutional tax assessment for an extra 11 months. See n. 5, *supra*. The State also opposed the suggestion that it place into a separate escrow account the

the State's reliance on a "presumptively valid statute" was a relevant consideration to Florida's obligation to provide relief for its unconstitutional deprivation of property, we would disagree with the Florida court's characterization of the Liquor Tax as such a statute. The Liquor Tax reflected only cosmetic changes from the prior version of the tax scheme that itself was virtually identical to the Hawaii scheme invalidated in *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263 (1984). See App. 263 (trial court held that the revised "legislation failed to surmount the constitutional violations addressed in *Bacchus [Imports]*"). The State can hardly claim surprise at the Florida courts' invalidation of the scheme.

The Florida Supreme Court also speculated that "if given a refund, [petitioner] would in all probability receive a windfall, since the cost of the tax has likely been passed on to [its] customers." 524 So. 2d, at 1010. The court's premise seems to be that the State, faced with an obligation to cure its discrimination during the contested tax period and choosing to meet that obligation through a refund, could legitimately choose to avoid generating a "windfall" for petitioner by refunding only that portion of the tax payment not "passed on" to customers (or even suppliers). Even were we to accept this premise, the State could not refuse to provide a refund based on sheer speculation that a "pass-on" occurred.[30]

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discriminatory portion of taxes collected during this period of time, on the ground that "[t]here is a statutory mechanism in place . . . allowing for refunds." App. 286.

[30] The state trial court, after ruling favorably upon petitioner's motions for a preliminary injunction and partial summary judgment based on its holding that the Liquor Tax violated the Commerce Clause, ruled *sua sponte* that its judgment would have only prospective effect, and this ruling was upheld on direct appeal. At no time has any party had the opportunity to present evidence concerning the extent, if any, of petitioner's ability to pass on the economic burden of the excise tax to its consumers or suppliers. The Florida Supreme Court's statement that the tax "has likely been passed on" by petitioner therefore is purely speculative.

We repeatedly have recognized that determining whether a particular business cost has in fact been passed on to customers or suppliers entails a highly sophisticated theoretical and factual inquiry; a court certainly cannot withhold part of a refund otherwise required to rectify an unconstitutional deprivation without first satisfactorily engaging in this inquiry.[31]

In any event, however, we reject respondents' premise that "equitable considerations" justify a State's attempt to avoid bestowing this so-called "windfall" when redressing a tax that is unconstitutional because discriminatory. In *United States* v. *Jefferson Electric Mfg. Co.*, 291 U. S. 386 (1934), we enforced a statutorily created pass-on defense in a refund action designed to redress a tax overassessment. Comparing such an action to one in assumpsit for "money had and received," we affirmed the Federal Government's power in this equitable action to withhold the amount that the taxpayer had already passed on to others, on the theory that the taxpayer ought not be "unjustly enriched" by his recovery from the Government after he has already "recovered" his losses through the pass-on. We observed that if the taxpayer "has shifted the [economic] burden [of the tax] to the purchasers, they and not he have been the actual sufferers

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[31] We have expressed particular concern about the theoretical, factual, and practical difficulties in engaging in satisfactory "pass-on" analysis in the context of antitrust doctrine. See *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720, 741–745 (1977); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481, 492–493 (1968). See generally A. Atkinson & J. Stiglitz, Lectures on Public Economics 160–226 (1980); R. Musgrave & P. Musgrave, Public Finance In Theory and Practice 256–300 (3d ed. 1980); McLure, Incidence Analysis and the Supreme Court: Examination of Four Cases from the 1980 Term, 1 Sup. Ct. Econ. Rev. 69 (1982); D. Phares, Who Pays State and Local Taxes? (1980). For this reason, we have observed that determining whether a particular business cost has been passed on "would often require additional long and complicated proceedings involving massive evidence and complicated theories." *Hanover Shoe*, *supra*, at 493.

and are the real parties in interest," *id.*, at 402, and he ought not receive a windfall for their injury.

But petitioner does not challenge here a tax assessment that merely exceeded the amount authorized by statute; petitioner's complaint was that the Florida tax scheme unconstitutionally discriminated against interstate commerce. The tax injured petitioner not only because it left petitioner poorer in an absolute sense than before (a problem that might be rectified to the extent petitioner passed on the economic incidence of the tax to others), but also because it placed petitioner at a relative disadvantage in the marketplace vis-à-vis competitors distributing preferred local products. See n. 25, *supra;* see also *Bacchus Imports*, *supra*, at 267 ("[E]ven if the tax [was] completely and successfully passed on, it increase[d] the price of [petitioner's] products as compared to the exempted beverages"). To whatever extent petitioner succeeded in passing on the economic incidence of the tax through higher prices to its customers, it most likely lost sales to the favored distributors or else incurred other costs (*e. g.*, for advertising) in an effort to maintain its market share.[32] The State cannot persuasively claim that "equity" entitles it to retain tax moneys taken unlawfully from petitioner due to its pass-on of the tax where the pass-on itself furthers the very competitive disadvantage constituting the Commerce Clause violation that rendered the deprivation un-

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[32] Petitioner's relative market share might have stayed constant if the favored distributors reacted by raising their own prices to the same extent as did petitioner when trying to pass on its excess tax burden. If so, however, petitioner still would have suffered a comparative economic injury because the tax pass-on would have enabled the favored distributors alone to derive an increase in total revenue from the discriminatory tax.

Petitioner's market share and total revenue also might have stayed constant, at least in the short run, had all of its sales to liquor retailers been pursuant to cost-plus contracts. See *Hanover Shoe*, *supra*, at 494. But respondents do not claim that petitioner was in this position.

lawful in the first place.[33] We thus reject respondents' reliance on a pass-on defense in this context.[34]

D

Respondents assert that requiring the State to rectify its unconstitutional discrimination during the contested tax period "would plainly cause serious economic and adminis-

[33] It is conceivable that a particular distributor's economic injury may be quite severe, for example, if the tax drives it out of the market entirely (though a rational disfavored distributor would not allow itself to incur any greater economic injury through a pass-on than it would have incurred had it simply shouldered the entire burden of the tax deprivation itself). However, the State's obligation under the Due Process Clause to provide a refund (should it choose this avenue of relief) extends only to refunding the excess taxes collected under the Liquor Tax. Petitioner has not sought in this action to recover any actual damages it may have suffered. See Brief for Petitioner on Rearg. 3, n. 2; *id.*, at 7.

[34] Respondents suggest that a pass-on defense may nevertheless be invoked as a matter of state law. While they concede that the State waived any sovereign immunity from suit through Fla. Stat. § 215.26's authorization of a state-court refund action, they contend that this waiver extends only to refunds sought where the taxpayer has borne the actual economic burden of the tax, citing *State ex rel. Szabo Food Service, Inc.* v. *Dickinson*, 286 So. 2d 529 (Fla. 1973). We need not consider the import of this contention, however, because respondents misdescribe state law. In this case, the Florida Supreme Court characterized its concern about petitioner receiving a "windfall" due to the alleged pass-on of its tax burden as only an "equitable consideration," not a state-law prohibition on relief. Moreover, no such state-law prohibition was recognized in *Szabo Food Service*, *supra*. There, the Florida Supreme Court refused to entertain a refund action brought by a distributor of food products to challenge a sales tax alleged to have been imposed erroneously as a matter of state law. The court noted that the legal incidence of the sales tax was placed not on the distributor but rather on its customers and that state law required the economic burden of the tax to be borne by the customers as well. *Id.*, at 532. The court held that under these unique circumstances the distributor lacked standing to seek a refund, explaining that "[o]ne who does not himself bear the financial burden of a wrongfully extracted tax suffers no loss or injury, and accordingly, would not have standing to demand a refund." *Ibid.* The court in *Szabo* did not mention, let alone rely on, a state-law immunity bar to the refund action.

trative dislocation for the State." Brief for Respondents on Rearg. 20. We agree that, within our due process jurisprudence, state interests traditionally have played, and may play, some role in shaping the contours of the relief that the State must provide to illegally or erroneously deprived taxpayers, just as such interests play a role in shaping the procedural safeguards that the State must provide in order to ensure the accuracy of the initial determination of illegality or error. See generally *Mathews* v. *Eldridge*, 424 U. S. 319, 347–348 (1976). We have already noted that States have a legitimate interest in sound fiscal planning and that this interest is sufficiently weighty to allow States to withhold predeprivation relief for allegedly unlawful tax assessments, providing postdeprivation relief only. See *supra*, at 37. But even if a State chooses to provide partial refunds as a means of curing the unlawful discrimination (as opposed to increasing the tax assessment of those previously favored), the State's interest in financial stability does not justify a refusal to provide relief. As noted earlier, see *supra*, at 46, the State here does not and cannot claim that the Florida courts' invalidation of the Liquor Tax was a surprise, and even after the trial court found a Commerce Clause violation the State failed to take reasonable precautions to reduce its ultimate exposure for the unconstitutional tax. And in the future, States may avail themselves of a variety of procedural protections against any disruptive effects of a tax scheme's invalidation, such as providing by statute that refunds will be available to only those taxpayers paying under protest, or enforcing relatively short statutes of limitation applicable to refund actions. See *supra*, at 45. Such procedural measures would sufficiently protect States' fiscal security when weighed against their obligation to provide meaningful relief for their unconstitutional taxation.

Respondents also observe that the State's choice of relief may entail various administrative costs (apart from the "cost"

of any refund itself[35]). Cf. *Mathews*, *supra*, at 348 ("[T]he Government's interest . . . in conserving scarce fiscal and administrative resources is a factor that must be weighed" when determining precise contours of process due). The State may, of course, consider such costs when choosing between the various avenues of relief open to it. Because the Florida Supreme Court did not recognize in its refund proceeding the State's obligation under the Due Process Clause to rectify the invalidity of its deprivation of petitioner's property, the court did not consider how any administrative costs might influence the selection and fine-tuning of the relief afforded petitioner. We leave this to the state court on remand.

IV

When a State penalizes taxpayers for failure to remit their taxes in timely fashion, thus requiring them to pay first before obtaining review of the tax's validity, federal due process principles long recognized by our cases require the State's postdeprivation procedure to provide a "clear and certain remedy," *O'Connor*, 223 U. S., at 285, for the deprivation of tax moneys in an unconstitutional manner. In this case, Florida may satisfy this obligation through any form of relief, ranging from a refund of the excess taxes paid by petitioner to an offsetting charge to previously favored distributors, that will cure any unconstitutional discrimination against interstate commerce during the contested tax period. The State is free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal require-

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[35] We reject respondents' intimation that the cost of any refund considered by the State might justify a decision to withhold it. Just as a State may not object to an otherwise available remedy providing for the return of real property unlawfully taken or criminal fines unlawfully imposed simply because it finds the property or moneys useful, so also Florida cannot object to a refund here just because it has other ideas about how to spend the funds.

ments we have outlined.[36] The judgment of the Florida Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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[36] The State is free, of course, to provide broader relief as a matter of state law than is required by the Federal Constitution. See *Bacchus Imports*, 468 U. S., at 277, n. 14.

Syllabus

BEGIER, TRUSTEE *v.* INTERNAL REVENUE SERVICE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 89–393. Argued March 27, 1990—Decided June 4, 1990

The Internal Revenue Code directs "every person receiving any payment for facilities or services" subject to excise taxes to "collect the amount of the tax from the person making such payment." 26 U. S. C. § 4291. It also requires an employer to "collect" Federal Insurance Contributions Act (FICA) taxes from its employees "by deducting the amount of the tax from the wages *as and when paid*," § 3102(a) (emphasis added), and to "deduct and withhold *upon such wages* [the employee's federal income tax]," § 3402(a)(1) (emphasis added). The amount of taxes "collected or withheld" is "held to be in a special fund in trust for the United States." § 7501. Thus, these taxes are often called "trust-fund taxes." After American International Airlines, Inc. (AIA), fell behind in its trust-fund tax payments, the Internal Revenue Service (IRS), pursuant to § 7512, ordered it to deposit all future taxes collected into a separate bank account. AIA established the account, but did not deposit funds sufficient to cover the entire amount of its obligations. Nonetheless, it remained current on the obligations, paying part of them from the separate bank account and part from its general operating funds. In a subsequent liquidation proceeding under the Bankruptcy Code, petitioner Begier was appointed AIA's trustee. Seeking to exercise his power under § 547(b) of the Bankruptcy Code—which permits a trustee to avoid certain preferential payments made before the debtor files for bankruptcy—Begier filed an adversary action against the Government to recover the entire amount that AIA had paid the IRS for trust-fund taxes during the 90 days before the bankruptcy filing. The Bankruptcy Court refused to permit Begier to recover any of the money AIA had paid out of the separate account on the ground that AIA had held that money in trust for the IRS. However, it allowed him to avoid most of the payments made out of AIA's general accounts, holding that such funds were property of the debtor. The District Court affirmed, but the Court of Appeals reversed, holding that *any* prepetition payment of trust-fund taxes is a payment of funds that are not the debtor's property, and that such a payment is therefore not an avoidable preference.

Held: AIA's trust-fund tax payments from its general accounts were transfers of property held in trust and therefore cannot be avoided as preferences. Pp. 58–67.

(a) Equality of distribution among creditors is a central policy of the Bankruptcy Code that is furthered by § 547(b) to the extent that it permits a trustee to avoid prepetition preferential transfers of "property of the debtor." Although not defined by the Code, "property of the debtor" is best understood to mean property that would have been part of the estate had it not been transferred. Its meaning is coextensive with its postpetition analog "property of the estate," which includes all of the debtor's legal or equitable interests in property as of the commencement of the case. § 541(a)(1). Since a debtor does not own an equitable interest in property he holds in trust for another, that interest is not "property of the estate" and, likewise, not "property of the debtor." Pp. 58–59.

(b) AIA created a trust within the meaning of 26 U. S. C. § 7501 at the moment the money was withheld or collected. The statutory trust extends to the amount of tax "collected or withheld," and the language of §§ 4291, 3102(a), and 3402(a)(1) makes clear that the acts of collecting and withholding occur at the time of payment—the recipient's payment for the service in the case of excise taxes and the employer's payment of wages in the case of FICA and income taxes. The fact that AIA neither put the taxes in a segregated fund nor paid them to the IRS does not somehow mean that AIA never collected or withheld them in the first place. Mandating segregation as a prerequisite to the creation of a trust under § 7501 would make § 7512's requirement that funds may be segregated in special and limited circumstances superfluous and would mean that an employer could avoid the creation of a trust simply by refusing to segregate. Pp. 60–62.

(c) The funds transferred from AIA's general accounts were trust assets. Neither § 7501 nor common-law rules for tracing trust res offer guidance on how to determine whether the assets were trust property. And the strict rule of *United States* v. *Randall*, 401 U. S. 513—which prohibited the IRS from recovering withheld taxes ahead of the bankruptcy proceeding's administrative expenses—did not survive the 1978 restructuring of the Bankruptcy Code. The 1978 Code's legislative history shows that Congress intended that the courts permit the use of "reasonable assumptions" under which the IRS could demonstrate that amounts of withheld taxes were still in the debtor's possession at the time the petition was filed. Thus, Congress expected that the IRS would have to show *some* connection between the trust and the assets sought to be applied to a debtor's trust-fund obligations. While the Bankruptcy Code does not demonstrate how extensive this nexus must

be, the legislative history identifies one reasonable assumption: that *any* voluntary prepetition payment of trust-fund taxes out of the debtor's assets is not a transfer of the debtor's property. Other rules might be reasonable, but the only evidence presented suggests that Congress preferred this one. Pp. 62–67.

878 F. 2d 762, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, BLACKMUN, STEVENS, O'CONNOR, and KENNEDY, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 67.

Paul J. Winterhalter argued the cause and filed a brief for petitioner.

Brian J. Martin argued the cause for respondent. With him on the briefs were *Solicitor General Starr, Assistant Attorney General Peterson, Deputy Solicitor General Wallace,* and *Gary D. Gray.*

JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the question whether a trustee in bankruptcy may "avoid" (*i. e.*, recover) from the Internal Revenue Service (IRS) payments of certain withholding and excise taxes that the debtor made before it filed for bankruptcy. We hold that the funds paid here were not the property of the debtor prior to payment; instead, they were held in trust by the debtor for the IRS. We accordingly conclude that the trustee may not recover the funds.

I

American International Airways, Inc. (AIA), was a commercial airline. As an employer, AIA was required to withhold federal income taxes and to collect Federal Insurance Contributions Act (FICA) taxes from its employees' wages. 26 U. S. C. § 3402(a) (income taxes); § 3102(a) (FICA taxes). As an airline, it was required to collect excise taxes from its customers for payment to the IRS. § 4291. Because the amount of these taxes is "held to be a special fund in trust for the United States," § 7501, they are often called "trust-fund

taxes." See, *e. g.*, *Slodov* v. *United States*, 436 U. S. 238, 241 (1978). By early 1984, AIA had fallen behind in its payments of its trust-fund taxes to the Government. In February of that year, the IRS ordered AIA to deposit all trust-fund taxes it collected thereafter into a separate bank account. AIA established the account, but did not deposit funds sufficient to cover the entire amount of its trust-fund tax obligations. It nonetheless remained current on these obligations through June 1984, paying the IRS $695,000 from the separate bank account and $946,434 from its general operating funds. AIA and the IRS agreed that all of these payments would be allocated to specific trust-fund tax obligations.

On July 19, 1984, AIA petitioned for relief from its creditors under Chapter 11 of the Bankruptcy Code, 11 U. S. C. § 1101 *et seq.* (1982 ed.). AIA unsuccessfully operated as a debtor in possession for three months. Accordingly, on September 19, the Bankruptcy Court appointed petitioner Harry P. Begier, Jr., trustee, and a plan of liquidation in Chapter 11 was confirmed. Among the powers of a trustee is the power under § 547(b)[1] to avoid certain payments made by the

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[1] This case is governed by 11 U. S. C. § 547(b) (1982 ed.), which reads: "Except as provided in subsection (c) of this section, the trustee may avoid any transfer of property of the debtor—

"(1) to or for the benefit of a creditor;

"(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

"(3) made while the debtor was insolvent;

"(4) made—

"(A) on or within 90 days before the date of the filing of the petition; or

"(B) between 90 days and one year before the date of the filing of the petition, if such creditor, at the time of such transfer—

"(i) was an insider; and

"(ii) had reasonable cause to believe the debtor was insolvent at the time of such transfer; and

"(5) that enables such creditor to receive more than such creditor would receive if—

"(A) the case were a case under chapter 7 of this title;

"(B) the transfer had not been made; and

debtor that would "enabl[e] a creditor to receive payment of a greater percentage of his claim against the debtor than he would have received if the transfer had not been made and he had participated in the distribution of the assets of the bankrupt estate." H. R. Rep. No. 95–595, p. 177 (1977). Seeking to exercise his avoidance power, Begier filed an adversary action against the Government to recover the entire amount that AIA had paid the IRS for trust-fund taxes during the 90 days before the bankruptcy filing.

The Bankruptcy Court found for the Government in part and for the trustee in part. *In re American International Airways, Inc.*, 83 B. R. 324 (ED Pa. 1988). It refused to permit the trustee to recover any of the money AIA had paid out of the separate account on the theory that AIA had held that money in trust for the IRS. *Id.*, at 327. It allowed the trustee to avoid most of the payments that AIA had made out of its general accounts, however, holding that "only where a tax trust fund is actually established by the debtor and the taxing authority is able to trace funds segregated by the debtor in a trust account established for the purpose of paying the taxes in question would we conclude that such funds are not property of the debtor's estate." *Id.*, at 329. The District Court affirmed. App. to Pet. for Cert. A-22–A-26. On appeal by the Government, the Third Circuit reversed, holding that *any* prepetition payment of trust-fund taxes is a payment of funds that are not the debtor's property and that such a payment is therefore not an avoidable preference. 878 F. 2d 762 (1989).[2] We granted certiorari, 493 U. S. 1017 (1990), and we now affirm.

"(C) such creditor received payment of such debt to the extent provided by the provisions of this title."

The statute has been amended to replace "property of the debtor" with "an interest of the debtor in property." See n. 3, *infra*. The old version of § 547(b) applies to this case, however, because AIA filed its bankruptcy petition before the effective date of the amendment.

[2] No other Court of Appeals has decided a case that presents the precise issue we decide here. The Ninth and District of Columbia Circuits have, however, resolved against the taxing authorities cases presenting related

II

A

Equality of distribution among creditors is a central policy of the Bankruptcy Code. According to that policy, creditors of equal priority should receive pro rata shares of the debtor's property. See, *e. g.*, 11 U. S. C. § 726(b) (1982 ed.); H. R. Rep. No. 95–595, *supra*, at 177–178. Section 547(b) furthers this policy by permitting a trustee in bankruptcy to avoid certain preferential payments made before the debtor files for bankruptcy. This mechanism prevents the debtor from favoring one creditor over others by transferring property shortly before filing for bankruptcy. Of course, if the debtor transfers property that would not have been available for distribution to his creditors in a bankruptcy proceeding, the policy behind the avoidance power is not implicated. The reach of § 547(b)'s avoidance power is therefore limited to transfers of "property of the debtor."

The Bankruptcy Code does not define "property of the debtor." Because the purpose of the avoidance provision is to preserve the property includable within the bankruptcy estate—the property available for distribution to creditors—"property of the debtor" subject to the preferential transfer provision is best understood as that property that would have been part of the estate had it not been transferred before the commencement of bankruptcy proceedings. For guidance,

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issues. See *In re R & T Roofing Structures & Commercial Framing, Inc.*, 887 F. 2d 981, 987 (CA9 1989) (rejecting the Government's argument that assets the IRS seized from a debtor to satisfy a trust-fund tax obligation before the debtor filed its bankruptcy petition were assets held in trust for the Government under 26 U. S. C. § 7501, and therefore deciding that the transfer effected by the seizure involved "property of the debtor" and was not exempt from avoidance); *Drabkin* v. *District of Columbia*, 263 U. S. App. D. C. 122, 125, 824 F. 2d 1102, 1105 (1987) (reaching a similar conclusion with respect to a voluntary payment of withheld District of Columbia employee income taxes in a case governed by a provision of local law that "essentially mirror[ed]" § 7501).

then, we must turn to § 541, which delineates the scope of "property of the estate" and serves as the postpetition analog to § 547(b)'s "property of the debtor."[3]

Section 541(a)(1) provides that the "property of the estate" includes "all legal or equitable interests of the debtor in property as of the commencement of the case." Section 541(d) provides:

> "Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest . . . becomes property of the estate under subsection (a) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold."

Because the debtor does not own an equitable interest in property he holds in trust for another, that interest is not "property of the estate." Nor is such an equitable interest "property of the debtor" for purposes of § 547(b). As the parties agree, then, the issue in this case is whether the money AIA transferred from its general operating accounts to the IRS was property that AIA had held in trust for the IRS.

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[3] To the extent the 1984 amendments to § 547(b) are relevant, they confirm our view that § 541 guides our analysis of what property is "property of the debtor" for purposes of § 547(b). Among the changes was the substitution of "an interest of the debtor in property" for "property of the debtor." 11 U. S. C. § 547(b) (1988 ed.). Section 547(b) thus now mirrors § 541's definition of "property of the estate" as certain "interests of the debtor in property." 11 U. S. C. § 541(a)(1) (1988 ed.). The Senate Report introducing a predecessor to the bill that amended § 547(b) described the new language as a "clarifying change." S. Rep. No. 98–65, p. 81 (1983). We therefore read both the older language ("property of the debtor") and the current language ("an interest of the debtor in property") as coextensive with "interests of the debtor in property" as that term is used in 11 U. S. C. § 541(a)(1) (1988 ed.).

B

We begin with the language of 26 U. S. C. § 7501, the Internal Revenue Code's trust-fund tax provision: "Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States." The statutory trust extends, then, only to "the amount of tax so collected or withheld." Begier argues that a trust-fund tax is not "collected or withheld" until specific funds are either sent to the IRS with the relevant return or placed in a segregated fund. AIA neither put the funds paid from its general operating accounts in a separate account nor paid them to the IRS before the beginning of the preference period. Begier therefore contends that no trust was ever created with respect to those funds and that the funds paid to the IRS were therefore property of the debtor.

We disagree. The Internal Revenue Code directs "every person receiving any payment for facilities or services" subject to excise taxes to "collect the amount of the tax from the person making such payment." § 4291. It also requires that an employer "collec[t]" FICA taxes from its employees "by deducting the amount of the tax from the wages *as and when paid.*" § 3102(a) (emphasis added). Both provisions make clear that the act of "collecting" occurs at the time of payment—the recipient's payment for the service in the case of excise taxes and the employer's payment of wages in the case of FICA taxes. The mere fact that AIA neither placed the taxes it collected in a segregated fund nor paid them to the IRS does not somehow mean that AIA never collected the taxes in the first place.

The same analysis applies to taxes the Internal Revenue Code requires that employers "withhold." Section 3402(a)(1) requires that "every employer making payment of wages shall deduct and withhold *upon such wages* [the employee's federal income tax]." (Emphasis added.) Withholding thus

occurs at the time of payment to the employee of his net wages. S. Rep. No. 95–1106, p. 33 (1978) ("[A]ssume that a debtor owes an employee $100 for salary on which there is required withholding of $20. If the debtor paid the employee $80, there has been $20 withheld. If, instead, the debtor paid the employee $85, there has been withholding of $15 (which is not property of the debtor's estate in bankruptcy)"). See *Slodov*, 436 U. S., at 243 (stating that "[t]here is no general requirement that the withheld sums be segregated from the employer's general funds," and thereby necessarily implying that the sums are "withheld" whether or not segregated). The common meaning of "withholding" supports our interpretation. See Webster's Third New International Dictionary 2627 (1981) (defining "withholding" to mean "the act or procedure of deducting a tax payment from income *at the source*") (emphasis added).

Our reading of § 7501 is reinforced by § 7512, which permits the IRS, upon proper notice, to require a taxpayer who has failed timely "to collect, truthfully account for, or pay over [trust-fund taxes]," or who has failed timely "to make deposits, payments, or returns of such tax," § 7512(a)(1), to "deposit such amount in a separate account in a bank . . . and . . . keep the amount of such taxes in such account until payment over to the United States," § 7512(b). If we were to read § 7501 to mandate segregation as a prerequisite to the creation of the trust, § 7512's requirement that funds be segregated in special and limited circumstances would become superfluous. Moreover, petitioner's suggestion that we read a segregation requirement into § 7501 would mean that an employer could avoid the creation of a trust simply by refusing to segregate. Nothing in § 7501 indicates, however, that Congress wanted the IRS to be protected only insofar as dictated by the debtor's whim. We conclude, therefore, that AIA created a trust within the meaning of § 7501 at the moment the relevant payments (from customers to AIA for ex-

cise taxes and from AIA to its employees for FICA and income taxes) were made.

C

Our holding that a trust for the benefit of the IRS existed is not alone sufficient to answer the question presented by this case: whether the *particular dollars* that AIA paid to the IRS from its general operating accounts were "property of the debtor." Only if those particular funds were held in trust for the IRS do they escape characterization as "property of the debtor." All § 7501 reveals is that AIA at one point created a trust for the IRS; that section provides no rule by which we can decide whether the assets AIA used to pay the IRS were assets belonging to that trust.

In the absence of specific statutory guidance on how we are to determine whether the assets transferred to the IRS were trust property, we might naturally begin with the common-law rules that have been created to answer such questions about other varieties of trusts. Unfortunately, such rules are of limited utility in the context of the trust created by § 7501. Under common-law principles, a trust is created *in property;* a trust therefore does not come into existence until the settlor identifies an ascertainable interest in property to be the trust res. G. Bogert, Law of Trusts and Trustees § 111 (rev. 2d ed. 1984); 1A W. Fratcher, Scott on Trusts § 76 (4th ed. 1987). A § 7501 trust is radically different from the common-law paradigm, however. That provision states that "the *amount* of [trust-fund] tax . . . collected or withheld shall be held to be a special fund in trust for the United States." (Emphasis added.) Unlike a common-law trust, in which the settlor sets aside particular *property* as the trust res, § 7501 creates a trust in an abstract "amount"—a dollar *figure* not tied to any particular assets—rather than in the actual dollars withheld.[4] Common-law tracing rules, designed

[4] The general common-law rule that a trust is not created absent a designation of particular property obviously does not invalidate § 7501's cre-

for a system in which particular property is identified as the trust res, are thus unhelpful in this special context.

Federal law delineating the nature of the relationship between the § 7501 trust and preferential transfer rules is limited. The only case in which we have explored that topic at any length is *United States* v. *Randall*, 401 U. S. 513 (1971), a case dealing with a postpetition transfer of property to discharge trust-fund tax obligations that the debtor had accrued prepetition. There, a court had ordered a debtor in possession to maintain a separate account for its withheld federal income and FICA taxes, but the debtor did not comply. When the debtor was subsequently adjudicated a bankrupt, the United States sought to recover from the debtor's general assets the amount of withheld taxes ahead of the expenses of the bankruptcy proceeding. The Government argued that the debtor held the amount of taxes due in trust for the IRS and that this amount could be traced to the funds the debtor had in its accounts when the bankruptcy petition was filed. The trustee maintained that no trust had been created because the debtor had not segregated the funds. The Court declined directly to address either of these contentions. *Id.*, at 515. Rather, the Court simply refused to permit the IRS to recover the taxes ahead of administrative expenses, stating that "the statutory policy of subordinating taxes to costs and expenses of administration would not be served by creating or enforcing trusts which eat up an estate, leaving little or nothing for creditors and court officers whose goods and services created the assets." *Id.*, at 517.

In 1978, Congress fundamentally restructured bankruptcy law by passing the new Bankruptcy Code. Among the changes Congress decided to make was a modification of the rule this Court had enunciated in *Randall* under the old Bankruptcy Act. The Senate bill attacked *Randall* directly, providing in § 541 that trust-fund taxes withheld or collected

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ation of a trust in the "amount" of withheld taxes. The common law of trusts is not binding on Congress.

prior to the filing of the bankruptcy petition were not "property of the estate." See S. Rep. No. 95–1106, at 33. See also *ibid.* ("These amounts will not be property of the estate regardless of whether such amounts have been segregated from other assets of the debtor by way of a special account, fund, or otherwise, or are deemed to be a special fund in trust pursuant to provisions of applicable tax law") (footnote omitted). The House bill did not deal explicitly with the problem of trust-fund taxes, but the House Report stated that "property of the estate" would not include property held in trust for another. See H. R. Rep. No. 95–595, at 368. Congress was unable to hold a conference, so the Senate and House floor managers met to reach compromises on the differences between the two bills. See 124 Cong. Rec. 32392 (1978) (remarks of Rep. Edwards); Klee, Legislative History of the New Bankruptcy Law, 28 DePaul L. Rev. 941, 953–954 (1979). The compromise reached with respect to the relevant portion of § 541, which applies to postpetition transfers, was embodied in the eventually enacted House amendment and explicitly provided that "in the case of property held in trust, the property of the estate includes the legal title, but not the beneficial interest in the property." 124 Cong. Rec., at 32417 (remarks of Rep. Edwards). Cf. *id.*, at 32363 (text of House amendment). Accordingly, the Senate language specifying that withheld or collected trust-fund taxes are not part of the bankruptcy estate was deleted as "unnecessary since property of the estate does not include the beneficial interest in property held by the debtor as a trustee. Under [§ 7051], the amounts of withheld taxes are held to be a special fund in trust for the United States." *Id.*, at 32417 (remarks of Rep. Edwards).[5]

[5] Because of the absence of a conference and the key roles played by Representative Edwards and his counterpart floor manager Senator DeConcini, we have treated their floor statements on the Bankruptcy Reform Act of 1978 as persuasive evidence of congressional intent. See, *e. g.*, *Commodity Futures Trading Comm'n* v. *Weintraub*, 471 U. S. 343, 351

Representative Edwards discussed the effects of the House language on the rule established by *Randall*, indicating that the House amendment would supplant that rule:

> "[A] serious problem exists where 'trust fund taxes' withheld from others are held to be property of the estate where the withheld amounts are commingled with other assets of the debtor. The courts should permit the use of reasonable assumptions under which the Internal Revenue Service, and other tax authorities, can demonstrate that amounts of withheld taxes are still in the possession of the debtor at the commencement of the case." *Ibid.*

The context of Representative Edwards' comment makes plain that he was discussing whether a *post*petition payment of trust-fund taxes involved "property of the estate." This focus is not surprising given that *Randall*, the case Congress was addressing, involved a postpetition demand for payment by the IRS. But Representative Edwards' discussion also applies to the question whether a *pre*petition payment is made from "property of the debtor." We have explained that "property of the debtor" is that property that would have been part of the estate had it not been transferred before the commencement of bankruptcy proceedings. *Supra*, at 58. The same "reasonable assumptions" therefore apply in both contexts.

The strict rule of *Randall* thus did not survive the adoption of the new Bankruptcy Code. But by requiring the IRS to "demonstrate that amounts of taxes withheld are still in the possession of the debtor at the commencement of the case [*i. e.*, at the filing of the petition]," 124 Cong. Rec., at 32417 (remarks of Rep. Edwards), Congress expected that the IRS would have to show *some* connection between the § 7501 trust

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(1985). Cf. 124 Cong. Rec. 32391 (1978) (remarks of Rep. Rousselot) (expressing view that remarks of floor manager of the Act have "the effect of being a conference report").

and the assets sought to be applied to a debtor's trust-fund tax obligations. See *United States* v. *Whiting Pools, Inc.*, 462 U. S. 198, 205, n. 10 (1983) (IRS cannot exclude funds from the estate if it cannot trace them to § 7501 trust property). The question in this case is how extensive the required nexus must be. The Bankruptcy Code provides no explicit answer, and Representative Edwards' admonition that courts should "permit the use of reasonable assumptions" does not add much. The House Report does, however, give sufficient guidance regarding those assumptions to permit us to conclude that the nexus requirement is satisfied here. That Report states:

> "A payment of withholding taxes constitutes a payment of money held in trust under Internal Revenue Code § 7501(a), and thus will not be a preference because the beneficiary of the trust, the taxing authority, is in a separate class with respect to those taxes, if they have been properly held for payment, as they will have been if the debtor is able to make the payments." H. R. Rep. No. 95–595, *supra*, at 373.[6]

Under a literal reading of the above passage, the bankruptcy trustee could not avoid *any* voluntary prepetition payment of trust-fund taxes, regardless of the source of the funds. As the House Report expressly states, the limitation that the funds must "have been properly held for payment" is satisfied "if the debtor is able to make the payments." The debtor's act of voluntarily paying its trust-fund tax obligation

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[6] Petitioner's claim that this legislative history is irrelevant because the House Bill was not enacted is in error. The exact language to which the quoted portion of the House Report refers was enacted into law. Compare § 547(b) with H. R. 8200, 95th Cong., 1st Sess., § 547(b) (1977). The version of § 541 that was eventually enacted *is* different from the original House bill, but only in that it makes explicit rather than implicit that "property of the estate" does not include the beneficiary's equitable interest in property held in trust by the debtor. Compare § 541(d) with H. R. 8200, *supra*, § 541(a)(1).

therefore is alone sufficient to establish the required nexus between the "amount" held in trust and the funds paid.

We adopt this literal reading. In the absence of any suggestion in the Bankruptcy Code about what tracing rules to apply, we are relegated to the legislative history. The courts are directed to apply "reasonable assumptions" to govern the tracing of funds, and the House Report identifies one such assumption to be that any voluntary prepetition payment of trust-fund taxes out of the debtor's assets is not a transfer of the debtor's property. Nothing in the Bankruptcy Code or its legislative history casts doubt on the reasonableness of that assumption. Other rules might be reasonable, too, but the only evidence we have suggests that Congress preferred this one. We see no reason to disregard that evidence.

III

We hold that AIA's payments of trust-fund taxes to the IRS from its general accounts were not transfers of "property of the debtor," but were instead transfers of property held in trust for the Government pursuant to § 7501. Such payments therefore cannot be avoided as preferences. The judgment of the Court of Appeals is

Affirmed.

JUSTICE SCALIA, concurring in the judgment.

Representative Edwards, the House floor manager for the bill that enacted the Bankruptcy Code, said on the floor that "[t]he courts should permit the use of reasonable assumptions" regarding the tracing of tax trust funds. 124 Cong. Rec. 32417 (1978). We do not know that anyone except the presiding officer was present to hear Representative Edwards. Indeed, we do not know for sure that Representative Edwards' words were even uttered on the floor rather than inserted into the Congressional Record afterwards. If Representative Edwards did speak these words, and if there were others present, they must have been surprised to hear

him talking about the tracing of 26 U. S. C. § 7501 tax trust funds, inasmuch as the bill under consideration did not relate to the Internal Revenue Code but the Bankruptcy Code, and contained no provision even mentioning trust-fund taxes. Only the Senate bill, and not the House proposal, had mentioned trust-fund taxes—and even the former had said nothing whatever about the *tracing* of tax trust funds. See S. 2266, 95th Cong., 2d Sess., § 541 (1978). Only the Senate *Committee Report* on the *unenacted* provision of the Senate bill had discussed that subject. See S. Rep. No. 95–1106, p. 33 (1978).

Nonetheless, on the basis of Representative Edwards' statement, today's opinion concludes that "[t]he courts are *directed*" (presumably it means directed by the entire Congress, and not just Representative Edwards) "to apply 'reasonable assumptions' to govern the tracing of funds." *Ante*, at 67 (emphasis added). I do not agree. Congress conveys its directions in the Statutes at Large, not in excerpts from the Congressional Record, much less in excerpts from the Congressional Record that do not clarify the text of any pending legislative proposal.

Even in the absence of direction to do so, however, I certainly think we should apply reasonable assumptions to govern the tracing of funds. Unfortunately, that still does not answer the question before us here. One "traces" a fund only after one identifies the fund in the first place. The problem here is not "following the res" of the tax trust, but identifying the res to begin with. Seeking to come to grips with this point, the Court once again resorts to legislative history, this time even further afield. It relies upon the House Report on what later became 11 U. S. C. § 547, which says:

> "A payment of withholding taxes constitutes a payment of money held in trust under Internal Revenue Code § 7501(a), and thus will not be a preference because the beneficiary of the trust, the taxing authority, is in a sep-

arate class with respect to those taxes, if they have been properly held for payment, as they will have been if the debtor is able to make the payments." H. R. Rep. No. 95–595, p. 373 (1977).

The Court decides this case by "adopting" "a literal reading" of the above language. *Ante*, at 66. I think it both demeaning and unproductive for us to ponder whether to adopt literal or not-so-literal readings of Committee Reports, as though they were controlling statutory text. Moreover, even applying the lax legislative-history standards of recent years, this Committee Report should not be considered relevant. If a welfare bill conditioned benefits upon a certain maximum level of "income," courts might well (regrettably) regard as authoritative the Committee Report's statement that "income" means "income as computed under the Internal Revenue Code"; but surely they would not regard as authoritative its statement that a particular class of receipt *constitutes* income under the Internal Revenue Code. Authoritativeness on the latter sort of point is what the Court accepts here. The proposed (and ultimately enacted) provision of law to which this Committee Report pertained was the general provision of the Bankruptcy Code setting forth the five conditions for a voidable preference, reading in part as follows:

"Except as provided in subsection (c) of this section, the trustee may avoid any transfer of property of the debtor —

"(1) to or for the benefit of a creditor;

"(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

"(3) made while the debtor was insolvent;

"(4) made . . . on or within 90 days before the date of the filing of the petition . . . ; and

"(5) that enables such creditor to receive more than such creditor would receive [under a chapter 7 bank-

ruptcy distribution]." H. R. 8200, 95th Cong., 2d Sess., § 547(b) (1977); see 11 U. S. C. § 547(b).

The Committee Report's discussion of withholding taxes paid during the preference period presumably clarifies the meaning of the phrase "property of the debtor" in this text. If that is authoritative concerning the construction and effect of § 7501, imagine what other laws concerning "property of the debtor" could also have been enacted through discussion in this Committee Report. The matter seems to me plainly too far beyond the immediate focus of the legislation to be deemed resolved by the accompanying Committee Report. It was certainly thoughtful of whoever drafted the report to try to clear up the issue of what kind of an estate, legal or equitable, the debtor possesses in trust-fund taxes that are paid, but that discussion is a kind of legislative-history "rider" that even the most ardent devotees of legislative history should ignore.

If the Court had applied to the text of the statute the standard tools of legal reasoning, instead of scouring the legislative history for some scrap that is on point (and therefore *ipso facto* relevant, no matter how unlikely a source of congressional reliance or attention), it would have reached the same result it does today, as follows: Section 7501 obviously intends to give the United States the advantages of a trust beneficiary with respect to collected and withheld taxes. Unfortunately, it does not always succeed in doing so. A trust without a res can no more be created by legislative decree than can a pink rock-candy mountain. In the nature of things no trust exists until a res is identified. Ordinarily the res is identified by the settlor of the trust; in the case of § 7501 it is initially identified (if at all) by the statute, subject (as I shall discuss) to later reidentification by the taxpayer. Where the taxes subject to the trust-fund provision of § 7501 are *collected* taxes, the statute plainly identifies the res: it is the collections. There may be difficulty in tracing them, but there is no doubt that they exist. Where, however, the

taxes subject to the trust-fund provision are *withheld* taxes, the statute provides no clear identification. When I pay a worker $90 there is no clearly identifiable locus of the $10 in withheld taxes that I do *not* pay him. Indeed, if my total assets at the time of the payment are $90 there is no conceivable locus.

We may have to grapple at some later date with the question whether the lack of immediate identification means that no trust arises, or rather that § 7501 creates some hitherto unheard-of floating trust in an unidentified portion of the taxpayer's current or later-acquired assets. We do not have to reach that question today, because even though identification was not made by the statute immediately, it *was* made by the taxpayer when it wrote a check upon a portion of a designated fund to the Government. (It is clear from the statutory scheme that the taxpayer has the power to identify which portion of its assets constitutes the trust fund; indeed, 26 U. S. C. § 7512 permits the Government to compel such identification where it has not been made.) Even if no trust existed before that check was written, it is clear that a trust existed then. See 1 W. Fratcher, Scott on Trusts § 26.5 (4th ed. 1987) (promise to create trust becomes effective when settlor transfers or otherwise designates res as trust property).

The designation here, however, occurred within the 90-day preference period. Ordinarily, the debtor's alienation of his equitable interest by declaring a trust would constitute a preference. It seems to me, however, that one must at least give this effect to § 7501's clearly expressed but sometimes ineffectual intent to create an *immediate* trust: If and when the trust res is identified from otherwise unencumbered assets, the trust should be deemed to have been in existence from the time of the collection or withholding. Thus, the designation of res does not constitute a preference, and the funds paid were not part of the debtor's estate.

For these reasons, I concur in the judgment of the Court.

ENGLISH *v.* GENERAL ELECTRIC CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 89–152. Argued April 25, 1990—Decided June 4, 1990

Petitioner English, a laboratory technician at a nuclear facility operated by respondent General Electric Company (GE), complained to GE's management and to the Federal Government about several perceived violations of nuclear-safety standards at the facility, including the failure of her co-workers to clean up radioactive spills in the laboratory. Frustrated by GE's failure to address her concerns, English on one occasion deliberately failed to clean a work table contaminated with uranium during an earlier shift. Instead, she outlined the contaminated areas with red tape to make them conspicuous and, a few days later, called her supervisor's attention to the fact that the marked-off areas still had not been cleaned. Shortly after work was halted for inspection and cleaning of the laboratory, GE charged English with a knowing failure to clean up radioactive contamination, temporarily assigned her to other work, and ultimately discharged her. She then filed a complaint with the Secretary of Labor, alleging that GE's actions violated § 210(a) of the Energy Reorganization Act of 1974, which makes it unlawful for a nuclear industry employer to retaliate against an employee for reporting safety violations. Although an Administrative Law Judge (ALJ) found a § 210(a) violation, the Secretary dismissed the complaint as untimely under the 30-day limitations period provided by § 210(b)(1). Subsequently, English filed a diversity action seeking compensatory and punitive damages from GE in the District Court, raising, *inter alia*, a state-law claim for intentional infliction of emotional distress. While rejecting GE's argument that the latter claim fell within a field—nuclear safety—that had been completely pre-empted by the Federal Government, the court nevertheless dismissed the claim on the ground that it conflicted with three particular aspects of § 210 and was therefore pre-empted. The Court of Appeals affirmed.

Held: English's state-law claim for intentional infliction of emotional distress is not pre-empted by federal law. Pp. 78–90.

(a) The claim is not barred on a field pre-emption theory. After reviewing the relevant statutory provisions and legislative history, the Court in *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation and Development Comm'n*, 461 U. S. 190, concluded that "the Federal Government has occupied the entire field of nuclear safety con-

cerns," *id.*, at 212, and expressed the view that Congress intended that only the "Government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant," *id.*, at 205. English's action, however, does not fall within the boundaries of the pre-empted field as so defined, since the state tort law at issue is not motivated by safety concerns, see *id.*, at 213, and since the claim's actual effect on the nuclear safety decisions made by those who build and run nuclear facilities is not sufficiently direct and substantial, cf. *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238. It is thus not surprising that there is no evidence of the necessary "clear and manifest" intent by Congress to pre-empt such claims. Pp. 80–86.

(b) English's claim does not conflict with particular aspects of § 210. First, neither the text nor the legislative history of § 210(g)—which provides that "Subsection (a) of this section [the prohibition on employer retaliation] shall not apply" where an employee "deliberately causes a violation of any requirement of this Act or the Atomic Energy Act"—reflects a congressional desire to preclude *all* relief, including state remedies, to a whistle-blower who deliberately commits a safety violation. Even if that were Congress' intent, the federal interest would be served by pre-empting recovery by *violators* of safety standards. Here, the ALJ found that English did not deliberately commit a violation. Second, absent some specific suggestion in the text or legislative history, the failure of § 210 to provide general authorization for the Secretary to award punitive damages for § 210(a) violations does not imply a congressional intent to bar a state action, like English's, that permits such an award. Third, the expeditious timeframes provided for the processing of § 210 claims do not reflect a congressional decision that, in order to encourage the reporting of safety violations and retaliatory behavior, no whistle-blower should be able to recover under any other law after the time for filing under § 210 has expired. Since many retaliatory incidents are a response to safety complaints made to the Federal Government, the Government is already aware of these safety violations even if employees do not invoke § 210's remedial provisions. Moreover, the suggestion that employees will forgo their § 210 options and rely solely on state remedies is simply too speculative a basis on which to rest a pre-emption finding. Pp. 87–90.

871 F. 2d 22, reversed and remanded.

BLACKMUN, J., delivered the opinion for a unanimous Court.

M. Travis Payne argued the cause for petitioner. With him on the briefs was *Arthur M. Schiller.*

Christopher J. Wright argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Starr, Deputy Solicitor General Roberts, Allen H. Feldman, Steven J. Mandel,* and *Jeffrey A. Hennemuth.*

Carter G. Phillips argued the cause for respondent. With him on the brief were *Rex E. Lee, Benjamin W. Heineman, Jr., Philip A. Lacovara,* and *Barton A. Smith.**

JUSTICE BLACKMUN delivered the opinion of the Court.

In the particular context of this case we must decide whether federal law pre-empts a state-law cause of action for intentional infliction of emotional distress. The suit is brought by an employee of a nuclear-fuels production facility against her employer and arises out of actions by the employer allegedly taken in retaliation for the employee's nuclear-safety complaints.

I

Petitioner Vera M. English was employed from 1972 to 1984 as a laboratory technician at the nuclear-fuels production facility operated by respondent General Electric Company (GE) in Wilmington, N. C. In February 1984, petitioner complained to GE's management and to the Nuclear Regulatory Commission (NRC) about several perceived violations of nuclear-safety standards at the facility, including

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*Briefs of *amici curiae* urging reversal were filed for the Attorney General of North Carolina et al. by *Lacy H. Thornburg,* Attorney General, *pro se, John C. Brooks, pro se, Donnell Van Noppen III,* and *Michael G. Okun;* for the National Conference of State Legislatures et al. by *Benna Ruth Solomon;* and for the Plaintiff Employment Lawyers Association by *J. Michael McGuinness* and *Paul Tobias.*

Nicholas S. Reynolds and *Richard K. Walker* filed a brief for the Nuclear Management and Resources Council, Inc., as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed for the Government Accountability Project by *Louis A. Clark;* and for the National Whistleblower Center by *Stephen M. Kohn* and *Michael D. Kohn.*

the failure of her co-workers to clean up radioactive material spills in the laboratory.

Frustrated by the company's failure to address her concerns, petitioner on one occasion deliberately failed to clean a work table contaminated with a uranium solution during a preceding shift. Instead, she outlined the contaminated areas with red tape so as to make them conspicuous. A few days later, petitioner called her supervisor's attention to the marked-off areas, which still had not been cleaned. As a result, work was halted while the laboratory was inspected and cleaned.

Shortly after this episode, GE charged petitioner with a knowing failure to clean up radioactive contamination and temporarily assigned her to other work. On April 30, 1984, GE's management informed petitioner that she would be laid off unless, within 90 days, she successfully bid for a position in an area of the facility where she would not be exposed to nuclear materials. On May 15, petitioner was notified of the company's final decision affirming the disciplinary action taken against her. Petitioner did not find another position by July 30, and her employment was terminated.[1]

In August, petitioner filed a complaint with the Secretary of Labor charging GE with violating § 210(a) of the Energy Reorganization Act of 1974, as added, 92 Stat. 2951, 42 U. S. C. § 5851(a) (1982 ed.), which makes it unlawful for an employer in the nuclear industry to

> "discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . .
>
> "(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this Act or the Atomic Energy Act of 1954, as

[1] Although, technically, petitioner was placed on a layoff status on July 30, and retained certain benefits and recall rights at that point, as a practical matter she no longer was employed by GE after that date.

amended, or a proceeding for the administration or enforcement of any requirement imposed under this Act or the Atomic Energy Act of 1954, as amended;

"(2) testified or is about to testify in any such proceeding or;

"(3) assisted or participated or is about to assist or participate in any manner in such a proceeding . . . or in any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954, as amended."[2]

In her charge, petitioner alleged that GE's actions constituted unlawful employment discrimination in retaliation for her nuclear-safety complaints to GE's management and to the NRC. An Administrative Law Judge (ALJ) to whom the matter was referred found that GE had violated § 210(a) when it transferred and then discharged petitioner. The Secretary, however, dismissed the complaint as untimely because it had not been filed, as required by § 210(b)(1), within 30 days after the May 15 notice of the company's final decision.[3]

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[2] If an employee believes that he has been discharged or otherwise discriminated against in violation of the statute, he may file a complaint with the Secretary of Labor within 30 days after the violation occurs. § 210(b)(1). The Secretary then must investigate the alleged violation, hold a public hearing, and, within 90 days of receiving the complaint, issue an order that either provides or denies relief. § 210(b)(2)(A). If a violation is found, the Secretary may order reinstatement with backpay, award compensatory damages, and require the violator to pay the employee's costs and attorney's fees. § 210(b)(2)(B). Any person adversely affected by an order of the Secretary may obtain judicial review in the appropriate United States court of appeals, and either the Secretary or the complainant may seek enforcement of the Secretary's order in United States district court. §§ 210(c) through (e).

[3] The United States Court of Appeals for the Fourth Circuit affirmed that decision but remanded the case for consideration of petitioner's separate claim that she was subjected to a continuing course of retaliatory harassment after the May 15 disciplinary decision. *English* v. *Whitfield*, 858 F. 2d 957 (1988). Upon remand, the ALJ concluded that that claim,

In March 1987, petitioner filed a diversity action against GE in the United States District Court for the Eastern District of North Carolina. Petitioner in four counts raised two claims, one for wrongful discharge and one for intentional infliction of emotional distress.[4] With respect to the latter, petitioner alleged that she was suffering from severe depression and emotional harm as a result of GE's "extreme and outrageous conduct." App. 20. Petitioner alleged that, in addition to transferring and ultimately firing her, GE (1) had removed her from the laboratory position under guard "as if she were a criminal," *id.*, at 14; (2) had assigned her to degrading "make work" in her substitute assignment, *ibid.;* (3) had derided her as paranoid; (4) had barred her from working in controlled areas; (5) had placed her under constant surveillance during working hours; (6) had isolated her from coworkers, even during lunch periods; and (7) had conspired to charge her fraudulently with violations of safety and criminal laws. *Id.*, at 14–17. Petitioner sought punitive as well as compensatory damages.

Although the District Court concluded that petitioner had stated a valid claim for intentional infliction of emotional distress under North Carolina law, it nonetheless granted GE's motion to dismiss. 683 F. Supp. 1006, 1017–1018 (1988). The court did not accept GE's argument that petitioner's claim fell within the field of nuclear safety, a field that, according to GE, had been completely pre-empted by the Federal Government. The court held, however, that petitioner's claim was pre-empted because it conflicted with three particular aspects of § 210: (1) a provision that bars recovery under the section to any employee who "deliberately causes a violation of any requirement of [the Energy Reorga-

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also, should be dismissed as time barred. The ALJ's recommended decision on this issue is still pending before the Secretary.

[4] The District Court ruled that petitioner had not made out a claim under state law for wrongful discharge. Because petitioner has not appealed that ruling, the wrongful-discharge claim is not now before us.

nization Act,] or of the Atomic Energy Act," § 210(g); (2) the absence of any provision generally authorizing the Secretary to award exemplary or punitive damages; and (3) the provisions requiring that a whistle-blower invoking the statute file an administrative complaint within 30 days after the violation occurs, and that the Secretary resolve the complaint within 90 days after its filing. See §§ 210(b)(1) and (b)(2)(A). In the court's view, Congress enacted this scheme to foreclose all remedies to whistle-blowers who themselves violate nuclear-safety requirements, to limit exemplary damages awards against the nuclear industry, and to guarantee speedy resolution of allegations of nuclear-safety violations—goals the court found incompatible with the broader remedies petitioner sought under state tort law.

The United States Court of Appeals for the Fourth Circuit affirmed the dismissal of petitioner's emotional distress claim on the basis of the District Court's reasoning. 871 F. 2d 22, 23 (1989). That court concluded that Congress had intended to foreclose nuclear whistle-blowers from pursuing state tort remedies and stated its belief that the District Court "correctly identified and applied the relevant federal and state law." *Id.*, at 23. Because of an apparent conflict with a decision of the First Circuit, see *Norris* v. *Lumbermen's Mutual Casualty Co.*, 881 F. 2d 1144 (1989), we granted certiorari. 493 U. S. 1055 (1990).

II

A

The sole question for our resolution is whether the Federal Government has pre-empted petitioner's state-law tort claim for intentional infliction of emotional distress. Our cases have established that state law is pre-empted under the Supremacy Clause, U. S. Const., Art. VI, cl. 2, in three circumstances. First, Congress can define explicitly the extent to which its enactments pre-empt state law. See *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85, 95–98 (1983). Pre-

emption fundamentally is a question of congressional intent, see *Schneidewind* v. *ANR Pipeline Co.*, 485 U. S. 293, 299 (1988), and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one.

Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947). Although this Court has not hesitated to draw an inference of field pre-emption where it is supported by the federal statutory and regulatory schemes, it has emphasized: "Where . . . the field which Congress is said to have pre-empted" includes areas that have "been traditionally occupied by the States," congressional intent to supersede state laws must be "'clear and manifest.'" *Jones* v. *Rath Packing Co.*, 430 U. S. 519, 525 (1977), quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S., at 230.

Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements, see, *e. g.*, *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941). See also *Maryland* v. *Louisiana*, 451 U. S. 725, 747 (1981).[5]

[5] By referring to these three categories, we should not be taken to mean that they are rigidly distinct. Indeed, field pre-emption may be under-

It is undisputed that Congress has not explicitly pre-empted petitioner's state-law tort action by inserting specific pre-emptive language into any of its enactments governing the nuclear industry. The District Court and apparently the Court of Appeals did not rest their decisions on a field pre-emption rationale either, but rather on what they considered an actual tension between petitioner's cause of action and the congressional goals reflected in § 210. In this Court, respondent seeks to defend the judgment both on the lower courts' rationale and on the alternative ground that petitioner's tort claim is located within a field reserved for federal regulation—the field of nuclear safety. Before turning to the specific aspects of § 210 on which the lower courts based their decisions, we address the field pre-emption question.

B

This is not the first case in which the Court has had occasion to consider the extent to which Congress has pre-empted the field of nuclear safety. In *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation and Development Comm'n*, 461 U. S. 190 (1983), the Court carefully analyzed the congressional enactments relating to the nuclear industry in order to decide whether a California law that conditioned the construction of a nuclear powerplant on a state agency's approval of the plant's nuclear-waste storage and disposal facilities fell within a pre-empted field. Although we need not repeat all of that analysis here, we summarize briefly the Court's discussion of the actions Congress has taken in the nuclear realm and the conclusions it drew from these actions.

Until 1954, the use, control, and ownership of all nuclear technology remained a federal monopoly. The Atomic Energy Act of 1954, 68 Stat. 919, as amended, 42 U. S. C.

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stood as a species of conflict pre-emption: A state law that falls within a pre-empted field conflicts with Congress' intent (either express or plainly implied) to exclude state regulation. Nevertheless, because we previously have adverted to the three-category framework, we invoke and apply it here.

§ 2011 *et seq.* (1982 ed.), stemmed from Congress' belief that the national interest would be served if the Government encouraged the private sector to develop atomic energy for peaceful purposes under a program of federal regulation and licensing. The Act implemented this policy decision by opening the door to private construction, ownership, and operation of commercial nuclear-power reactors under the strict supervision of the Atomic Energy Commission (AEC). See *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 63 (1978). The AEC was given exclusive authority to license the transfer, delivery, receipt, acquisition, possession, and use of all nuclear materials. As was observed in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 550 (1978): "The [Federal Government's] prime area of concern in the licensing context . . . [was] national security, public health, and safety." With respect to these matters, no significant role was contemplated for the States.

In 1959, Congress amended the Atomic Energy Act in order to "clarify the respective responsibilities . . . of the States and the [Federal Government] with respect to the regulation of byproduct, source, and special nuclear materials," 42 U. S. C. § 2021(a)(1) (1982 ed.), and generally to increase the States' role. The 1959 amendments authorized the AEC, by agreements with state governors, to discontinue the Federal Government's regulatory authority over certain nuclear materials under specified conditions. State regulatory programs adopted under the amendment were required to be "coordinated and compatible" with those of the AEC. § 2021(g).

In 1974, Congress passed the Energy Reorganization Act, 88 Stat. 1233, 42 U. S. C. § 5801 *et seq.* (1982 ed.), which abolished the AEC and transferred its regulatory and licensing authority to the NRC. § 5841(f). The 1974 Act also expanded the number and range of safety responsibilities under the NRC's charge. As was observed in *Pacific Gas*, the

NRC does not purport to exercise its authority based upon economic considerations, but rather is concerned primarily with public health and safety. See 461 U. S., at 207. Finally, in 1978, Congress amended both the Atomic Energy Act and the Energy Reorganization Act. Pub. L. 95–601, 92 Stat. 2947. Among these amendments is § 210, 42 U. S. C. § 5851 (1982 ed.), which, as discussed above, encourages employees to report safety violations and provides a mechanism for protecting them against retaliation for doing so.

After reviewing the relevant statutory provisions and legislative history, the Court in *Pacific Gas* concluded that "the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States." 461 U. S., at 212. Although we ultimately determined that the California statute at issue there did not fall within the pre-empted field, we made clear our view that Congress intended that only "the Federal Government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant." *Id.*, at 205. In the present dispute, respondent and petitioner disagree as to whether petitioner's tort action falls within the boundaries of the pre-empted field referred to in *Pacific Gas*.

Respondent maintains that the pre-empted field of "nuclear safety" is a large one, and that § 210 is an integral part of it. Specifically, respondent contends that because the Federal Government is better able to promote nuclear safety if whistle-blowers pursue the federal remedy, *the whole area* marked off by § 210 should be considered part of the pre-empted field identified in *Pacific Gas*. Accordingly, respondent argues that all state-law remedies for conduct that is covered by § 210 are pre-empted by Congress' decision to have the Federal Government exclusively regulate the field of nuclear safety.

Petitioner and the United States as *amicus curiae*, on their part, contend that petitioner's claim for intentional infliction of emotional distress is not pre-empted because the

Court made clear in *Pacific Gas* that state laws supported by nonsafety rationales do not lie within the pre-empted field. They argue that since the state tort of intentional infliction of emotional distress is supported by a nonsafety rationale—namely, the State's "substantial interest in protecting its citizens from the kind of abuse of which [petitioner] complain[s]," see *Farmer* v. *Carpenters*, 430 U. S. 290, 302 (1977)—petitioner's cause of action must be allowed to go forward.

We think both arguments are somewhat wide of the mark. With respect to respondent's contention, we find no "clear and manifest" intent on the part of Congress, in enacting § 210, to pre-empt all state tort laws that *traditionally* have been available to those persons who, like petitioner, allege outrageous conduct at the hands of an employer. Indeed, acceptance of respondent's argument would require us to conclude that Congress has displaced not only state tort law, which is at issue in this case, but also state *criminal* law, to the extent that such criminal law is applied to retaliatory conduct occurring at the site of a nuclear employer. For example, if an employer were to retaliate against a nuclear whistle-blower by hiring thugs to assault the employee on the job (conduct literally covered by § 210), respondent's position would imply that the state criminal law prohibiting such conduct is within the pre-empted field. We simply cannot believe that Congress intended that result. Instead, we think the District Court was essentially correct in observing that while § 210 obviously bears some relation to the field of nuclear safety, its "paramount" purpose was the protection of employees.[6] See 683 F. Supp., at 1013. Accordingly, we see no basis for respondent's contention that all state-law claims arising from conduct covered by the section are necessarily included in the pre-empted field.

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[6] In this regard, we note that the enforcement and implementation of § 210 was entrusted by Congress not to the NRC—the body primarily responsible for nuclear safety regulation—but to the Department of Labor.

Nor, however, can we accept petitioner's position, or the reading of *Pacific Gas* on which it is based. It is true that the holding in that case was premised, in part, on the conclusion that the California ban on nuclear construction was not motivated by safety concerns. Indeed, the majority of the Court suggested that a "state moratorium on nuclear construction grounded in safety concerns falls squarely within the prohibited field." 461 U. S., at 213. In other words, the Court defined the pre-empted field, in part, by reference to the motivation behind the state law. This approach to defining the field had some support in the text of the 1959 amendments to the Atomic Energy Act, which provided, among other things, that "[n]othing in this section shall be construed to affect the authority of any State or local agency to regulate activities *for purposes other than protection against radiation hazards*." 42 U. S. C. § 2021(k) (1982 ed.) (emphasis added). But the Court did not suggest that a finding of safety motivation was *necessary* to place a state law within the pre-empted field. On the contrary, it took great pains to make clear that state regulation of matters directly affecting the radiological safety of nuclear-plant construction and operation, "even if enacted out of nonsafety concerns, would nevertheless [infringe upon] the NRC's exclusive authority." 461 U. S., at 212. Thus, even as the Court suggested that part of the pre-empted field is defined by reference to the purpose of the state law in question, it made clear that another part of the field is defined by the state law's actual effect on nuclear safety.

Because it is clear that the state tort law at issue here is not motivated by safety concerns, the former portion of the field argument is not relevant.[7] The real issue, then, is

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[7] Two Justices thought that since the California statute at issue in *Pacific Gas* was not motivated by safety concerns, there was no reason for the majority to discuss this portion of the field argument there either. See 461 U. S., at 223–224. Whether the suggestion of the majority in *Pacific Gas* that legislative purpose is relevant to the definition of the pre-empted

whether petitioner's tort claim is so related to the "radiological safety aspects involved in the . . . operation of a nuclear [facility]," see *id.*, at 205, that it falls within the pre-empted field. In addressing this issue, we must bear in mind that not every state law that in some remote way may affect the nuclear safety decisions made by those who build and run nuclear facilities can be said to fall within the pre-empted field. We have no doubt, for instance, that the application of state minimum wage and child labor laws to employees at nuclear facilities would not be pre-empted, even though these laws could be said to affect tangentially some of the resource allocation decisions that might have a bearing on radiological safety. Instead, for a state law to fall within the pre-empted zone, it must have some direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels. We recognize that the claim for intentional infliction of emotional distress at issue here may have some effect on these decisions, because liability for claims like petitioner's will attach additional consequences to retaliatory conduct by employers. As employers find retaliation more costly, they will be forced to deal with complaints by whistle-blowers by other means, including altering radiological safety policies. Nevertheless, we believe that this effect is neither direct nor substantial enough to place petitioner's claim in the pre-empted field.

This result is strongly suggested by the decision in *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238 (1984). The Court there held that a claim for punitive damages in a state tort action arising out of the escape of plutonium from a federally licensed nuclear facility did not fall within the pre-empted field discussed in *Pacific Gas*. The Court reached this result notwithstanding the "tension between the conclusion

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field is part of the holding of that case is not an issue before us today because, as discussed above, even if safety motivation is relevant, petitioner's broad suggestion that safety motivation is necessary to a finding that a particular state law falls within the occupied field lacks merit.

that [radiological] safety regulation is the exclusive concern of the federal law and the conclusion that a State may nevertheless award damages [including punitive damages] based on its own law of liability" governing unsafe working conditions. 464 U. S., at 256. Although the decision in *Silkwood* was based in substantial part on legislative history suggesting that Congress did not intend to include in the pre-empted field state tort remedies for radiation-based injuries, see *id.*, at 251–256, we think it would be odd, if not irrational, to conclude that Congress intended to include tort actions stemming from retaliation against whistle-blowers in the pre-empted field but intended not to include tort actions stemming from radiation damage suffered as a result of actual safety violations. Potential liability for the kind of claim at issue in *Silkwood* will affect radiological safety decisions more directly than will potential liability under the kind of claim petitioner raises, because the tort claim in *Silkwood* attaches additional consequences to safety violations themselves, rather than to employer conduct that merely arises from allegations of safety violations. Moreover, and related, the prospect of compensatory and punitive damages for radiation-based injuries will undoubtedly affect nuclear employers' primary decisions about radiological safety in the construction and operation of nuclear power facilities far more substantially than will liability under the kind of claim petitioner asserts. It is thus not surprising that we find no evidence of a "clear and manifest" intent on the part of Congress to pre-empt tort claims like petitioner's. Cf. *Goodyear Atomic Corp.* v. *Miller*, 486 U. S. 174, 186 (1988) (increased workers' compensation award for injury caused by a safety violation at a Government-owned nuclear facility is "incidental regulatory pressure" that Congress finds acceptable). Accordingly, we conclude that petitioner's claim does not lie within the pre-empted field of nuclear safety.[8]

[8] Respondent relies, see Brief for Respondent 45–49, on decisions construing the pre-emptive effect of the National Labor Relations Act

C

We now turn to the question whether, as the lower courts concluded, petitioner's claim conflicts with particular aspects of § 210. On its face, the section does no more than grant a federal administrative remedy to employees in one industry against one type of employer discrimination—retaliation for whistle-blowing. Ordinarily, the mere existence of a federal regulatory or enforcement scheme, even one as detailed as § 210, does not by itself imply pre-emption of state remedies. The Court has observed: "Undoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law. . . . Instead, we must look for special features warranting pre-emption." *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U. S. 707, 719 (1985). Here, the District Court identified three "special features" of § 210 that it believed were incompatible with petitioner's claim.

The District Court relied first on § 210(g), which provides that "Subsection (a) of this section [the prohibition on employer retaliation] shall not apply" where an employee "deliberately causes a violation of any requirement of this Act or of the Atomic Energy Act." According to the District Court and respondent, this section reflects a congressional desire to preclude *all* relief, including state remedies, to a whistle-blower who deliberately commits a safety violation referred

(NLRA), 29 U. S. C. § 151 *et seq.*, to argue that petitioner's claim falls within the pre-empted field. We regard this reliance as misplaced. To begin with, the NLRA, unlike statutes governing the nuclear-employment field, comprehensively deals with labor-management relations from the inception of organizational activity through the negotiation of a collective-bargaining agreement. Moreover, special factors support the conclusion that pre-emption of state labor relations law is warranted—specifically, Congress' perception that the NLRA was needed because state legislatures and courts were unable to provide an informed and coherent labor policy. See *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274, 286 (1971).

to in § 210(g). Permitting any state-law claim based on whistle-blowing retaliation, the court reasoned, would frustrate this congressional objective. We do not agree. As an initial matter, we note that the text of § 210(g) specifically limits its applicability to the remedy provided by § 210(a) and does not suggest that it bars state-law tort actions. Nor does the legislative history of § 210 reveal a clear congressional purpose to supplant state-law causes of action that might afford broader relief. Indeed, the only explanation for any of the statute's remedial limitations is the Committee Report's statement that employees who deliberately violate nuclear-safety requirements would be denied protection under § 210(g) "[i]n order to avoid abuse of the protection afforded *under this section.*" S. Rep. No. 95–848, p. 30 (1978) (emphasis added).

In any event, even if the District Court and respondent are correct in concluding that Congress wanted those who deliberately commit nuclear-safety violations, as defined under § 210(g), to be denied all remedies against employer retaliation, this federal interest would be served by pre-empting state law only to the extent that it afforded recovery *to such violators.* See *Norris* v. *Lumbermen's Mutual Casualty Co.*, 881 F. 2d 1144, 1150 (CA1 1989). In the instant case, the ALJ found that petitioner had not deliberately committed a safety violation within the meaning of § 210(g), App. to Pet. for Cert. 44a, and neither the Secretary nor the lower courts have suggested otherwise. Thus, barring petitioner's tort action would not even serve the federal interest the lower courts and respondent have gleaned from their reading of this section.

The District Court also relied on the absence in § 210 of general authorization for the Secretary to award exemplary damages against employers who engage in retaliatory conduct. The District Court concluded, and respondent now argues, that this absence implies a congressional intent to bar a state action, like petitioner's, that permits such an award.

As the District Court put it, § 210 reflects "an informed judgment [by Congress] that in no circumstances should a nuclear whistler blower receive punitive damages when fired or discriminated against because of his or her safety complaints." 683 F. Supp., at 1014. We believe the District Court and respondent have read too much into Congress' decision not to authorize exemplary damages for most § 210 violations. First, even with respect to actions brought under § 210, the District Court was incorrect in stating that "in no circumstances" will a nuclear whistle-blower receive punitive damages; § 210(d) authorizes a district court to award exemplary damages in enforcement proceedings brought by the Secretary. Moreover, and more importantly, we think the District Court failed to follow this Court's teaching that "[o]rdinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law." *California* v. *ARC America Corp.*, 490 U. S. 93, 105 (1989). Absent some specific suggestion in the text or legislative history of § 210, which we are unable to find, we cannot conclude that Congress intended to pre-empt all state actions that permit the recovery of exemplary damages.

Finally, we address the District Court's holding that the expeditious timeframes provided by Congress for the processing of § 210 claims reflect a congressional decision that no whistle-blower should be able to recover under any other law after the time for filing under § 210 has expired. The District Court reasoned, and respondent agrees, that if a state-law remedy is available after the time for filing a § 210 complaint has run, a whistle-blower will have less incentive to bring a § 210 complaint. As a result, the argument runs, federal regulatory agencies will remain unaware of some safety violations and retaliatory behavior and will thus be unable to ensure radiological safety at nuclear facilities. We cannot deny that there is some force to this argument, but we

do not believe that the problem is as great as respondent suggests.

First, many, if not most, retaliatory incidents come about as a response to safety complaints that employees register with federal regulatory agencies. The Federal Government thus is already aware of these safety violations, whether or not the employee invokes the remedial provisions of § 210. Also, we are not so sure as respondent seems to be that employees will forgo their § 210 options and rely solely on state remedies for retaliation. Such a prospect is simply too speculative a basis on which to rest a finding of pre-emption. The Court has observed repeatedly that pre-emption is ordinarily not to be implied absent an "actual conflict." See, *e. g.*, *Savage* v. *Jones*, 225 U. S. 501, 533 (1912). The "teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists." *Huron Portland Cement Co.* v. *Detroit*, 362 U. S. 440, 446 (1960).

III

We conclude that petitioner's claim for intentional infliction of emotional distress does not fall within the pre-empted field of nuclear safety as that field has been defined in prior cases. Nor does it conflict with any particular aspect of § 210. The contrary judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

PEEL *v.* ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS

CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 88–1775. Argued January 17, 1990—Decided June 4, 1990

Petitioner Peel is licensed to practice law in Illinois and other States. He also has a "Certificate in Civil Trial Advocacy" from the National Board of Trial Advocacy (NBTA), which offers periodic certification to applicants who meet exacting standards of experience and competence in trial work. The Administrator of respondent Attorney Registration and Disciplinary Commission of Illinois filed a complaint alleging that Peel, by using a professional letterhead that stated his name, followed by the indented notation "Certified Civil Trial Specialist By the [NBTA]" and the unindented notation "Licensed: Illinois, Missouri, Arizona," was, *inter alia*, holding himself out as a certified legal specialist in violation of Rule 2–105(a)(3) of the Illinois Code of Professional Responsibility. The Commission recommended censure. The State Supreme Court adopted the Commission's recommendation, concluding that the First Amendment did not protect the letterhead because the public could confuse the State and NBTA as the sources of his license to practice and of his certification, and because the certification could be read as a claim of superior quality.

Held: The judgment is reversed, and the case is remanded.

126 Ill. 2d 397, 534 N. E. 2d 980, reversed and remanded.

JUSTICE STEVENS, joined by JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE KENNEDY, concluded that a lawyer has a constitutional right, under the standards applicable to commercial speech, to advertise his or her certification as a trial specialist by NBTA. Pp. 99–111.

(a) Truthful advertising related to lawful activities is entitled to First Amendment protections. Although a State may prohibit misleading advertising entirely, it may not place an absolute prohibition on potentially misleading information if the information may also be presented in a way that is not deceptive. *In re R. M. J.*, 455 U. S. 191. Pp. 99–100.

(b) Peel's letterhead is not actually or inherently misleading. The facts stated on his letterhead are true and verifiable, and there has been no finding of actual deception or misunderstanding. The state court's focus on the implied "claim" as to the "quality" of Peel's legal services confuses the distinction between statements of opinion or quality and statements of objective facts that may support an inference of quality. Even if NBTA standards are not well known, there is no evidence that

consumers, such as those in States with certification plans, are misled if they do not inform themselves of the precise standards of certification. There also has been no finding, and there is no basis for the belief, that Peel's representation generally would be associated with governmental action. The public understands that licenses are issued by governmental authorities and that many certificates are issued by private organizations, and it is unlikely that the public necessarily would confuse certification as a "specialist" by a national organization with formal state recognition. Moreover, other States that have evaluated lawyers' advertisements of NBTA certifications have concluded that they were not misleading and were protected by the First Amendment. Pp. 100–106.

(c) The State's interest in avoiding any potential that Peel's statements might mislead is insufficient to justify a categorical ban on their use; nor does the State Supreme Court's inherent authority to supervise its own bar insulate its judgment from this Court's review for constitutional infirmity. The need for a complete prophylactic rule against any claim of certification or specialty is undermined by the fact that the same risk of deception is posed by specified designations—for "Registered Patent Attorney" and "Proctor in Admiralty"—that are permitted under Rule 2–105(a). Such information facilitates the consumer's access to legal services and better serves the administration of justice. To the extent that such statements could confuse consumers, the State might consider screening certifying organizations or requiring a disclaimer about the certifying organization or the standards of a specialty. Pp. 106–111.

JUSTICE MARSHALL, joined by JUSTICE BRENNAN, agreeing that the State may not prohibit Peel from holding himself out as a certified NBTA trial specialist because the letterhead is neither actually nor inherently misleading, concluded that the letterhead is potentially misleading and thus the State may enact regulations other than a total ban to ensure that the public is not misled by such representations. The letterhead is potentially misleading because NBTA's name could give the impression to nonlawyers that the organization is a federal governmental agency; the juxtaposition of the references to Peel's state licenses to practice law and to his certification by the NBTA may lead individuals to believe that the NBTA is somehow sanctioned by the States; and the reference to NBTA certification may cause people to think that Peel is necessarily a better trial lawyer than attorneys without certification, because facts as well as opinions may be misleading when they are presented without adequate information. A State could require a lawyer to provide additional information in order to prevent a claim of NBTA certification from being misleading. A State may require, for example, that the letterhead include a disclaimer stating that the NBTA is a private organization not affiliated with or sanctioned by the State or Federal Government, or

information about NBTA's requirements for certification so that any inferences drawn by consumers about the certified attorney's qualifications would be based on more complete knowledge of the meaning of NBTA certification. Each State may decide for itself, within First Amendment constraints, how best to prevent such claims from being misleading. Pp. 111–117.

STEVENS, J., announced the judgment of the Court and delivered an opinion, in which BRENNAN, BLACKMUN, and KENNEDY, JJ., joined. MARSHALL, J., filed an opinion concurring in the judgment, in which BRENNAN, J., joined, *post*, p. 111. WHITE, J., filed a dissenting opinion, *post*, p. 118. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA, J., joined, *post*, p. 119.

Bruce J. Ennis, Jr., argued the cause and filed briefs for petitioner.

Stephen J. Marzen argued the cause for the Federal Trade Commission as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Rill*, *Deputy Solicitor General Merrill*, *Kevin J. Arquit*, *Jay C. Shaffer*, and *Ernest J. Isenstadt*.

William F. Moran III argued the cause for respondent. With him on the brief was *James J. Grogan*.*

JUSTICE STEVENS announced the judgment of the Court and delivered an opinion, in which JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE KENNEDY join.

The Illinois Supreme Court publicly censured petitioner because his letterhead states that he is certified as a civil trial specialist by the National Board of Trial Advocacy. We

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*Briefs of *amici curiae* urging reversal were filed for the American Advertising Federation, Inc., by *Philip B. Kurland* and *Alan S. Madans;* for the Association of National Advertisers, Inc., by *Burt Neuborne;* for the Association of Trial Lawyers of America et al. by *Jeffrey Robert White* and *Russ M. Herman;* for Public Citizen by *David C. Vladeck* and *Alan B. Morrison;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo*, *Paul D. Kamenar*, *Alan M. Slobodin*, and *Richard Samp*.

Briefs of *amici curiae* were filed for the Academy of Certified Trial Lawyers of Minnesota by *Clarance E. Hagglund;* and for the National Board of Trial Advocacy by *Timothy Wilton* and *Jacob D. Fuchsberg*.

granted certiorari to consider whether the statement on his letterhead is protected by the First Amendment. 492 U. S. 917 (1989).[1]

I

This case comes to us against a background of growing interest in lawyer certification programs. In the 1973 Sonnett Memorial Lecture, then Chief Justice Warren E. Burger advanced the proposition that specialized training and certification of trial advocates is essential to the American system of justice.[2] That proposition was endorsed by a number of groups of lawyers[3] who were instrumental in establishing the National Board of Trial Advocacy (NBTA) in 1977.

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[1] The First Amendment to the United States Constitution provides in part:

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

If a statement may not be censored by the Federal Government, it is also protected from censorship by the State of Illinois. See *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697 (1931).

[2] Burger, The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice? 42 Ford. L. Rev. 227 (1973) (recording the Fourth Annual John F. Sonnett Memorial Lecture delivered on November 26, 1973). The address warned that a lawyer is not qualified, "simply by virtue of admission to the bar, to be an advocate in trial courts in matters of serious consequence." *Id.*, at 240. Other proponents stress more positive reasons for certification such as the creation of "a powerful professional and economic incentive to increase [lawyers'] competence." Brief for Academy of Certified Trial Lawyers of Minnesota as *Amicus Curiae* 15.

[3] See Trial Advocacy as a Specialty: Final Report of the Annual Chief Justice Earl Warren Conference on Advocacy in the United States (sponsored by the Roscoe Pound-American Trial Lawyers Foundation) (1976).

The groups sponsoring NBTA include the National District Attorneys Association, the Association of Trial Lawyers of America, the International Academy of Trial Lawyers, the International Society of Barristers, the National Association of Criminal Defense Lawyers, the National Association of Women Lawyers, and the American Board of Professional Liability Attorneys.

Since then, NBTA has developed a set of standards and procedures for periodic certification of lawyers with experience and competence in trial work. Those standards, which have been approved by a board of judges, scholars, and practitioners, are objective and demanding. They require specified experience as lead counsel in both jury and nonjury trials, participation in approved programs of continuing legal education, a demonstration of writing skills, and the successful completion of a day-long examination. Certification expires in five years unless the lawyer again demonstrates his or her continuing qualification.[4]

NBTA certification has been described as a "highly-structured" and "arduous process that employs a wide range of assessment methods." Task Force on Lawyer Competence, Report With Findings and Recommendations to the Conference of Chief Justices, Publication No. NCSC-021, pp. 33–34 (May 26, 1982). After reviewing NBTA's procedures, the Supreme Court of Minnesota found that "NBTA applies a rigorous and exacting set of standards and examinations on a national scale before certifying a lawyer as a trial

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[4] Brief for NBTA as *Amicus Curiae* 9–13. The current NBTA requirements are that an applicant: (1) be a bar member in good standing; (2) disclose any misconduct including criminal convictions or professional discipline; (3) show at least five years of actual practice in civil trial law during the period immediately preceding application for certification; (4) show substantial involvement in trial practice, including 30% of professional time in civil trial litigation during each of the five years preceding application; (5) demonstrate experience by appearing as lead counsel in at least 15 complete trials of civil matters to verdict or judgment, including at least 45 days of trial and 5 jury trials, and by appearing as lead counsel in 40 additional contested matters involving the taking of testimony; (6) participate in 45 hours of continuing legal education in civil trial practice in the three years preceding application; (7) be confidentially reviewed by six attorneys, including two against or with whom the applicant has tried a civil matter, and a judge before whom the applicant has appeared within the preceding two years; (8) provide a substantial trial court memorandum or brief that was submitted to a court in the preceding three years; and (9) pass a day-long written examination testing both procedural and substantive law in various areas of civil trial practice.

specialist." *In re Johnson*, 341 N. W. 2d 282, 283 (1983). The Alabama Supreme Court similarly concluded that "a certification of specialty by NBTA would indicate a level of expertise with regard to trial advocacy in excess of the level of expertise required for admission to the bar generally." *Ex parte Howell*, 487 So. 2d 848, 851 (1986).

II

Petitioner practices law in Edwardsville, Illinois. He was licensed to practice in Illinois in 1968, in Arizona in 1979, and in Missouri in 1981. He has served as president of the Madison County Bar Association and has been active in both national and state bar association work.[5] He has tried to verdict over 100 jury trials and over 300 nonjury trials, and has participated in hundreds of other litigated matters that were settled. NBTA issued petitioner a "Certificate in Civil Trial Advocacy" in 1981, renewed it in 1986, and listed him in its 1985 Directory of "Certified Specialists and Board Members."[6]

Since 1983 petitioner's professional letterhead has contained a statement referring to his NBTA certification and to the three States in which he is licensed. It appears as follows:

> "Gary E. Peel
> "Certified Civil Trial Specialist
> "By the National Board of Trial Advocacy
> "Licensed: Illinois, Missouri, Arizona."[7]

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[5] Petitioner has been vice chair of the Insurance and Tort Committee of the General Practice Session of the American Bar Association and an officer of the Tri-City Bar Association. He is a member of the Illinois State Bar Association, the Arizona State Bar Association, the Missouri State Bar Association, the Illinois Trial Lawyers Association, and the Association of Trial Lawyers of America. Hearing Tr., App. G to Pet. for Cert. 28a–29a.

[6] Report of the Hearing Panel, App. C to Pet. for Cert. 19a; App. 22–23.

[7] App. D to Pet. for Cert. 21a.

In 1987, the Administrator of the Attorney Registration and Disciplinary Commission of Illinois (Commission) filed a complaint alleging that petitioner, by use of this letterhead, was publicly holding himself out as a certified legal specialist in violation of Rule 2–105(a)(3) of the Illinois Code of Professional Responsibility. That Rule provides:

> "A lawyer or law firm may specify or designate any area or field of law in which he or its partners concentrates or limits his or its practice. Except as set forth in Rule 2–105(a), no lawyer may hold himself out as 'certified' or a 'specialist.'"[8]

The complaint also alleged violations of Rule 2–101(b), which requires that a lawyer's public "communication shall contain all information necessary to make the communication not misleading and shall not contain any false or misleading statement or otherwise operate to deceive," and of Rule 1–102 (a)(1), which generally subjects a lawyer to discipline for violation of any Rule of the Code of Professional Responsibility. Disciplinary Rules 2–101(b), 1–102(a)(1) (1988).

After a hearing, the Commission recommended censure for a violation of Rule 2–105(a)(3). It rejected petitioner's First Amendment claim that a reference to a lawyer's certification as a specialist was a form of commercial speech that could not

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[8] Disciplinary Rule 2–105(a)(3) (1988). The exceptions are for patent, trademark, and admiralty lawyers. The remainder of Rule 2–105 provides:

"Rule 2–105. Limitation of Practice.

"(a) A lawyer shall not hold himself out publicly as a specialist, except as follows:

"(1) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation 'Patents,' 'Patent Attorney,' 'Patent Lawyer,' or 'Registered Patent Attorney' or any combination of those terms, on his letterhead and office sign.

"(2) A lawyer engaged in the trademark practice may use the designation 'Trademarks,' 'Trademark Attorney' or 'Trademark Lawyer,' or a combination of those terms, and a lawyer engaged in the admiralty practice may use the designation 'Admiralty,' 'Proctor in Admiralty' or 'Admiralty Lawyer,' or a combination of those terms, in any form of communication otherwise permitted under Rules 2–101 through 2–104."

be "'subjected to blanket suppression.'" Report of the Hearing Panel, App. C to Pet. for Cert. 19a. Although the Commission's "Findings of Facts" did not contain any statement as to whether petitioner's representation was deceptive, its "Conclusion of Law" ended with the brief statement that petitioner,

> "by holding himself out, on his letterhead as 'Gary E. Peel, Certified Civil Trial Specialist—By the National Board of Trial Advocacy,' is in direct violation of the above cited Rule [2–105(a)(3)].
>
> "We hold it is 'misleading' as our Supreme Court has never recognized or approved any certification process." *Id.*, at 20a.

The Illinois Supreme Court adopted the Commission's recommendation for censure. It held that the First Amendment did not protect petitioner's letterhead because the letterhead was misleading in three ways. First, the State Supreme Court concluded that the juxtaposition of the reference to petitioner as "certified" by NBTA and the reference to him as "licensed" by Illinois, Missouri, and Arizona "could" mislead the general public into a belief that petitioner's authority to practice in the field of trial advocacy was derived solely from NBTA certification. It thus found that the statements on the letterhead impinged on the court's exclusive authority to license its attorneys because they failed to distinguish voluntary certification by an unofficial group from licensure by an official organization. *In re Peel*, 126 Ill. 2d 397, 405–406, 534 N. E. 980, 983–984 (1989).

Second, the court characterized the claim of NBTA certification as "misleading because it tacitly attests to the qualifications of [petitioner] as a civil trial advocate." *Id.*, at 406, 534 N. E. 2d, at 984. The court noted confusion in the parties' descriptions of NBTA's requirements,[9] but did not

[9] 126 Ill. 2d, at 406–407, 534 N. E. 2d, at 984–985. The court noted some ambiguity and inconsistency in the descriptions of required trial experience: by petitioner as 40 jury trials carried to verdict, by *amicus* Association of Trial Lawyers of America as 15 major cases carried to verdict,

consider whether NBTA certification constituted reliable, verifiable evidence of petitioner's experience as a civil trial advocate. Rather, the court reasoned that the statement was tantamount to an implied claim of superiority of the quality of petitioner's legal services and therefore warranted restriction under our decision in *In re R. M. J.*, 455 U. S. 191 (1982). 126 Ill. 2d, at 406, 534 N. E. 2d, at 984.

Finally, the court reasoned that use of the term "specialist" was misleading because it incorrectly implied that Illinois had formally authorized certification of specialists in trial advocacy. The court concluded that the conjunction of the reference to being a specialist with the reference to being licensed implied that the former was the product of the latter. *Id.*, at 410, 534 N. E. 2d, at 986. Concluding that the letterhead was inherently misleading for these reasons, the court upheld the blanket prohibition of Rule 2–105(a) under the First Amendment.

III

The Illinois Supreme Court considered petitioner's letterhead as a form of commercial speech governed by the "constitutional limitations on the regulation of lawyer advertising." 126 Ill. 2d, at 402, 534 N. E. 2d, at 982. The only use of the letterhead in the record is in petitioner's correspondence with the Commission itself. Petitioner contends that, absent evidence of any use of the letterhead to propose commercial transactions with potential clients, the statement should be accorded the full protections of noncommercial speech. However, he also acknowledges that "this case can and should be decided on the narrower ground that even if it is commercial speech it cannot be categorically prohibited." Tr. of Oral Arg. 9. We agree that the question to be decided

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and by *amicus* NBTA as 15 complete trials to verdict, at least 5 of which were to a jury. Petitioner's brief to the state court did fail to report the newly revised standards provided by the *amici*, whose descriptions varied from each other's only in terminology. Brief for Petitioner 23, n. 26. All parties have provided the revised standards to this Court. See n. 4, *supra*.

is whether a lawyer has a constitutional right, under the standards applicable to commercial speech, to advertise his or her certification as a trial specialist by NBTA.

In *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977), this Court decided that advertising by lawyers was a form of commercial speech entitled to protection by the First Amendment. Justice Powell summarized the standards applicable to such claims for the unanimous Court in *In re R. M. J.*, 455 U. S., at 203:

> "Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. *But the States may not place an absolute prohibition on certain types of potentially misleading information*, e. g., *a listing of areas of practice, if the information also may be presented in a way that is not deceptive*. . . .
>
> "Even when a communication is not misleading, the State retains some authority to regulate. But the State must assert a substantial interest and the interference with speech must be in proportion to the interest served." (Emphasis added.)

In this case we must consider whether petitioner's statement was misleading and, even if it was not, whether the potentially misleading character of such statements creates a state interest sufficiently substantial to justify a categorical ban on their use.

The facts stated on petitioner's letterhead are true and verifiable. It is undisputed that NBTA has certified petitioner as a civil trial specialist and that three States have licensed him to practice law. There is no contention that any

potential client or person was actually misled or deceived by petitioner's stationery. Neither the Commission nor the State Supreme Court made any factual finding of actual deception or misunderstanding, but rather concluded, as a matter of law, that petitioner's claims of being "certified" as a "specialist" were necessarily misleading absent an official state certification program. Notably, although petitioner was originally charged with a violation of Disciplinary Rule 2–101(b), which aims at misleading statements by an attorney, his letterhead was not found to violate this rule.

In evaluating petitioner's claim of certification, the Illinois Supreme Court focused not on its facial accuracy, but on its implied claim "as to the quality of [petitioner's] legal services," and concluded that such a qualitative claim "'might be so likely to mislead as to warrant restriction.'" 126 Ill. 2d, at 406, 534 N. E. 2d, at 984 (quoting *In re R. M. J.*, 455 U. S., at 201). This analysis confuses the distinction between statements of opinion or quality and statements of objective facts that may support an inference of quality. A lawyer's certification by NBTA is a verifiable fact, as are the predicate requirements for that certification. Measures of trial experience and hours of continuing education, like information about what schools the lawyer attended or his or her bar activities, are facts about a lawyer's training and practice. A claim of certification is not an unverifiable opinion of the ultimate quality of a lawyer's work or a promise of success, cf. *In re R. M. J.*, 455 U. S., at 201, n. 14, but is simply a fact, albeit one with multiple predicates, from which a consumer may or may not draw an inference of the likely quality of an attorney's work in a given area of practice.[10]

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[10] Of course, many lawyers who do not have or publicize certification are in fact more able than others who do claim such a credential. The Commission does not suggest that the *absence* of certification leads consumers to conclude that these attorneys are unqualified. In any event, such a negative inference would be far more likely in a State that certifies attor-

We must assume that some consumers will infer from petitioner's statement that his qualifications in the area of civil trial advocacy exceed the general qualifications for admission to a state bar. Thus if the certification had been issued by an organization that had made no inquiry into petitioner's fitness, or by one that issued certificates indiscriminately for a price, the statement, even if true, could be misleading. In this case, there is no evidence that a claim of NBTA certification suggests any greater degree of professional qualification than reasonably may be inferred from an evaluation of its rigorous requirements. Much like a trademark, the strength of a certification is measured by the quality of the organization for which it stands. The Illinois Supreme Court merely notes some confusion in the parties' explanation of one of those requirements. See n. 9, *supra*. We find NBTA standards objectively clear, and, in any event, do not see why the degree of uncertainty identified by the State Supreme Court would make the letterhead inherently misleading to a consumer. A number of other States have their own certification plans and expressly authorize references to specialists and certification,[11] but there is no evidence that the con-

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neys under a comprehensive formal program, than in one that provides no official recognition.

[11] See, *e. g.*, Ala. Code Prof. Resp. Temp. DR 2–112 (1989); Ariz. Rule Prof. Conduct ER 7.4 (1990); Ark. Model Rule Prof. Conduct 7.4(c) (1990); Cal. Rule Ct., Policies Governing the State Bar of California Program for Certifying Legal Specialists (1990); Conn. Rule Prof. Conduct 7.4A–C (1989); Fla. Rule Regulating Bar 6–4 (1990); Ga. Rules Ct. Ann., DR 2–105(3) (1989); La. Rev. Stat. Ann., Rule of Prof. Conduct 7.4(b) (1988); Minn. Rule of Prof. Conduct 7.4 and Minn. State Bd. of Legal Certification Rules 5, 6, 8 (1990); N. J. Ct. Rule 1:39 and N. J. Rule Prof. Conduct 7.4 (1989); N. M. Rules Governing Practice of Law, Legal Specialization 19–101 *et seq.* (1988); N. C. Ann. Rules, Plan of Certified Legal Specialization, App. H (1990); S. C. Sup. Ct. Rule 53 (1988); Tex. State Bar Rules, Art. 10, § 9, DR 2–101(C), (1989); Utah Rule Prof. Conduct 7.4(b) (1990).

Board certification of specialists in various branches of medicine, handled by the 23 member boards of the American Board of Medical Specialties, is based on various requirements of education, residency, examinations

sumers in any of these States are misled if they do not inform themselves of the precise standards under which claims of certification are allowed.

Nor can we agree with the Illinois Supreme Court's somewhat contradictory fears that juxtaposition of the references to being "certified" as a "specialist" with the identification of the three States in which petitioner is "licensed" conveys, on the one hand, the impression that NBTA had the authority to grant those licenses and, on the other, that the NBTA certification was the product of official state action. The separate character of the two references is plain from their texts: one statement begins with the verb "[c]ertified" and identifies the source as the "*National* Board of Trial Advocacy," while the second statement begins with the verb "[l]icensed" and identifies *States* as the source of licensure. The references are further distinguished by the fact that one is indented below petitioner's name while the other uses the same margin as his name. See *supra*, at 96. There has been no finding that any person has associated certification with governmental action—state or federal—and there is no basis for belief that petitioner's representation generally would be so construed.

We are satisfied that the consuming public understands that licenses—to drive cars, to operate radio stations, to sell liquor—are issued by governmental authorities and that a host of certificates—to commend job performance, to convey an educational degree, to commemorate a solo flight or a hole in one—are issued by private organizations. The dictionary definition of "certificate," from which the Illinois

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and evaluations. American Board of Medical Specialties, Board Evaluation Procedures: Developing a Research Agenda, Conference Proceedings 7–11 (1981). The average member of the public does not know or necessarily understand these requirements, but board certification nevertheless has "come to be regarded as evidence of the skill and proficiency of those to whom they [have] been issued." American Board of Medical Specialties, Evaluating the Skills of Medical Specialists 1 (J. Lloyd and D. Langsley eds. 1983).

Supreme Court quoted only excerpts, comports with this common understanding:

> "[A] document issued by *a school*, a state agency, *or a professional organization* certifying that one has satisfactorily *completed a course of studies, has passed a qualifying examination, or has* attained professional standing in a given field and may officially practice or hold a position in that field." Webster's Third New International Dictionary 367 (1986 ed.) (emphasis added to portions omitted from 126 Ill. 2d, at 405, 534 N. E. 2d, at 984).

The court relied on a similarly cramped definition of "specialist," turning from Webster's—which contains no suggestion of state approval of "specialists"—to the American Bar Association's Comment to Model Rule 7.4, which prohibits a lawyer from stating or implying that he is a "specialist" except for designations of patent, admiralty, or state-designated specialties. The Comment to the Rule concludes that the terms "specialist" and "specialty" "have acquired a secondary meaning implying formal recognition as a specialist and, therefore, use of these terms is misleading" in States that have no formal certification procedures. ABA Model Rule of Professional Conduct 7.4 and Comment (1989). We appreciate the difficulties that evolving standards for attorney certification present to national organizations like the ABA.[12] However, it seems unlikely that petitioner's state-

[12] Prior to its revision in 1989, the Comment to ABA Model Rule of Professional Conduct 7.4 also prohibited any statement that a lawyer's practice "is limited to," or "concentrated in," an area under the same explanation that these terms had "a secondary meaning implying formal recognition as a specialist." Model Rule 7.4 Comment (1983). When Rule 7.4 was originally proposed in 1983, proponents of unsuccessful amendments to drop all prohibition of terms argued that "the public does not attach the narrow meaning to the word 'specialist' that the legal profession generally does. The public would perceive no distinction between a lawyer's claim that he practices only probate law and a claim that he concentrates his practice in probate law." ABA, The Legislative History of the

ment about his certification as a "specialist" by an identified national organization necessarily would be confused with formal state recognition. The Federal Trade Commission, which has a long history of reviewing claims of deceptive advertising, fortifies this conclusion with its observation that "one can readily think of numerous other claims of specialty—from 'air conditioning specialist' in the realm of home repairs to 'foreign car specialist' in the realm of automotive repairs—that cast doubt on the notion that the public would automatically mistake a claim of specialization for a claim of formal recognition by the State." Brief for Federal Trade Commission as *Amicus Curiae* 24.

We reject the paternalistic assumption that the recipients of petitioner's letterhead are no more discriminating than the audience for children's television. Cf. *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 74 (1983).[13] The two

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Model Rules of Professional Conduct 189 (1987). The amendments' opponents argued that allowing lawyers to designate themselves as specialists would undermine the States' ability to set up and control specialization programs. *Ibid.* This position essentially conceded that these terms did not *yet* have "a secondary meaning implying formal recognition," but only that they *could develop* such a secondary meaning if state programs came into being.

Rule 7.4's exception for designations of "Patent Attorney" and "Proctor in Admiralty" ignores the asserted interest in avoiding confusion from any secondary meaning of these terms. The Comment to Rule 7.4 actually imbues these terms with a historical, virtually formal, recognition, despite the lack of any prerequisites for their use: "Recognition of specialization in patent matters is a matter of long-established policy of the Patent and Trademark Office. Designation of admiralty practice has a long historical tradition associated with maritime commerce and the federal courts." ABA Model Rule of Professional Conduct 7.4 Comment (1989).

[13] JUSTICE O'CONNOR's legal conclusion about the deceptive potential of petitioner's letterhead, like that of the Illinois Supreme Court, rests on a flexible appraisal of the character of the consuming public. For example, her opinion emphasizes the "public's comparative lack of knowledge" about the legal profession and its lack of "sophistication concerning legal services," *post*, at 120, 124, but simultaneously reasons that the public will believe that all certifications are state sanctioned because of their "common

state courts that have evaluated lawyers' advertisements of their certifications as civil trial specialists by NBTA have concluded that the statements were not misleading or deceptive on their face, and that, under our recent decisions, they were protected by the First Amendment. *Ex parte Howell*, 487 So. 2d 848 (Ala. 1986); *In re Johnson*, 341 N. W. 2d 282 (Minn. 1983). Given the complete absence of any evidence of deception in the present case, we must reject the contention that petitioner's letterhead is actually misleading.

IV

Even if petitioner's letterhead is not actually misleading, the Commission defends Illinois' categorical prohibition against lawyers' claims of being "certified" or a "specialist" on the assertion that these statements are potentially misleading. In the Commission's view, the State's interest in avoiding any possibility of misleading some consumers with such communications is so substantial that it outweighs the cost of providing other consumers with relevant information about lawyers who are certified as specialists. See *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U. S. 557, 566 (1980).

We may assume that statements of "certification" as a "specialist," even though truthful, may not be understood fully by some readers. However, such statements pose no greater potential of misleading consumers than advertising

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knowledge that States police the ethical standards of the profession" and their specific knowledge that States like California are now certifying legal specialists, *post*, at 124. These consumers also can distinguish "Registered Patent Attorney" from "Certified Patent Attorney," interpreting the former as an acceptable "reporting of professional experience," but the latter as a deceptive "claim of quality." *Post*, at 126.

We prefer to assume that the average consumer, with or without knowledge of the legal profession, can understand a statement that certification by a *national* organization is not certification by the *State*, and can decide what, if any, value to accord this information.

admission to "Practice before: The United States Supreme Court," *In re R. M. J.*, 455 U. S. 191 (1982),[14] of exploiting the audience of a targeted letter, *Shapero* v. *Kentucky Bar Assn.*, 486 U. S. 466 (1988), or of confusing a reader with an accurate illustration, *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626 (1985). In this case, as in those, we conclude that the particular state rule restricting lawyers' advertising is "'broader than reasonably necessary to prevent the' perceived evil." *Shapero*, 486 U. S., at 472, (quoting *In re R. M. J.*, 455 U. S., at 203). Cf. *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978) (restricting in-person solicitation).[15] The need for a complete prophylactic against any claim of specialty is undermined by the fact that use of titles such as "Registered Patent Attorney" and "Proctor in Admiralty," which are permitted under Rule 2–105(a)'s exceptions, produces the same risk of deception.

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[14] The attempt in JUSTICE O'CONNOR's dissent to distinguish *In re R. M. J.* by reasoning that a consumer can contact the Supreme Court to see if a lawyer is really a member of the Court's Bar, *post*, at 122, misses the point. Both admission to the Bar of this Court and certification by NBTA are facts, whether or not consumers verify them. The legal question is whether a statement of either fact is nonetheless so misleading that it falls beyond the First Amendment's protections. We found that the advertisement of admission to the Bar of this Court could not be banned, despite recognition that "this relatively uninformative fact is at least bad taste" and "could be misleading to the general public unfamiliar with the requirements of admission to the Bar of this Court." *In re R. M. J.*, 455 U. S., at 205–206.

[15] It is noteworthy that JUSTICE WHITE's reference to the overbreadth doctrine, see *post*, at 118–119, is potentially misleading. That doctrine allows a party whose own conduct is not protected by the First Amendment to challenge a regulation as overbroad because of its impact on parties not before the Court. In this case we hold that Illinois Disciplinary Rule 2–105 is invalid as applied to petitioner Peel. Accordingly, the overbreadth doctrine to which JUSTICE WHITE refers has no relevance to our analysis.

Lacking empirical evidence to support its claim of deception, the Commission relies heavily on the inherent authority of the Illinois Supreme Court to supervise its own bar. JUSTICE O'CONNOR's dissent urges that "we should be more deferential" to the State, asserting without explanation that "the Supreme Court of Illinois is in a far better position than is this Court to determine which statements are misleading or likely to mislead."[16] Whether the inherent character of a statement places it beyond the protection of the First Amendment is a question of law over which Members of this Court should exercise *de novo* review. Cf. *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 498–511 (1984). That the judgment below is by a State Supreme Court exercising review over the actions of its State Bar Commission does not insulate it from our review for constitutional infirmity. See, *e. g.*, *Baird* v. *State Bar of Arizona*, 401 U. S. 1 (1971). The Commission's authority is necessarily constrained by the First Amendment to the Federal Constitution, and specifically by the principle that disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information. *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 770 (1976);

[16] *Post*, at 121. JUSTICE O'CONNOR's abdication of review would create radical disparities in First Amendment protections from State to State. On the one hand, it finds that the Illinois Supreme Court "properly concluded [that] certification is tantamount to a claim of quality and superiority and is therefore inherently likely to mislead." *Post*, at 123. Under this analysis, claims of certification by States as well as by private organizations are deceptive and thus fall outside of the First Amendment's protection; indeed, Illinois forbids claims of "certification" as a "specialist" by any entity. See also *post*, at 121 (listing States that ban certification). On the other hand, JUSTICE O'CONNOR apparently also would defer to the contrary judgments of other States, which have held that the First Amendment protects claims of NBTA certification by members of their bars, *e. g.*, *Ex parte Howell*, 487 So. 2d 848 (Ala. 1986); *In re Johnson*, 341 N. W. 2d 282 (Minn. 1983), and have held that claims of official state certification are permissible, see, *e. g.*, *post*, at 124 (listing States that certify).

Central Hudson Gas & Electric Corp., 447 U. S., at 562. Even if we assume that petitioner's letterhead may be potentially misleading to some consumers, that potential does not satisfy the State's heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information to the public. *In re R. M. J.*, 455 U. S., at 203.

The presumption favoring disclosure over concealment is fortified in this case by the separate presumption that members of a respected profession are unlikely to engage in practices that deceive their clients and potential clients. As we noted in *Bates* v. *State Bar of Arizona*, 433 U. S., at 379:

> "It is at least somewhat incongruous for the opponents of advertising to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort."

We do not ignore the possibility that some unscrupulous attorneys may hold themselves out as certified specialists when there is no qualified organization to stand behind that certification. A lawyer's truthful statement that "XYZ Board" has "certified" him as a "specialist in admiralty law" would not necessarily be entitled to First Amendment protection if the certification were a sham. States can require an attorney who advertises "XYZ certification" to demonstrate that such certification is available to all lawyers who meet objective and consistently applied standards relevant to practice in a particular area of the law. There has been no showing—indeed no suggestion—that the burden of distinguishing between certifying boards that are bona fide and those that are bogus would be significant, or that bar associations and official disciplinary committees cannot police deceptive practices effectively. Cf. *Shapero*, 486 U. S., at 477 ("The record before us furnishes no evidence that scrutiny of targeted solicitation letters will be appreciably more burdensome or less reliable than scrutiny of advertisements").

"If the naiveté of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective." *Bates*, 433 U. S., at 375. To the extent that potentially misleading statements of private certification or specialization could confuse consumers, a State might consider screening certifying organizations or requiring a disclaimer about the certifying organization or the standards of a specialty. *In re R. M. J.*, 455 U. S., at 201–203.[17] A State may not, however, completely ban statements that are not actually or inherently misleading, such as certification as a specialist by bona fide organizations such as NBTA. Cf. *In re Johnson*, 341 N. W. 2d, at 283 (striking down the Disciplinary Rule that prevented statements of being "'a specialist unless and until the Minnesota Supreme Court adopts or authorizes rules or regulations permitting him to do so'"). Information about certification and specialties facilitates the consumer's access to legal services and thus better serves the administration of justice.[18]

Petitioner's letterhead was neither actually nor inherently misleading. There is no dispute about the bona fides and the

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[17] It is not necessary here—as it also was not in *In re R. M. J.*—to consider when a State might impose some disclosure requirements, rather than a total prohibition, in order to minimize the possibility that a reader will misunderstand the significance of a statement of fact that is protected by the First Amendment. We agree with JUSTICE MARSHALL, *post*, at 111, that a holding that a total ban is unconstitutional does not necessarily preclude less restrictive regulation of commercial speech.

[18] See *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 376 (1977). A principal reason why consumers do not consult lawyers is because they do not know how to find a lawyer able to assist them with their particular problems. Federal Trade Commission, Staff Report on Improving Consumer Access to Legal Services: The Case for Removing Restrictions of Truthful Advertising 1 (1984). JUSTICE O'CONNOR would extend this convenience to consumers who seek admiralty, patent, and trademark lawyers, *post*, at 126, but not to consumers who need a lawyer certified or specializing in more commonly needed areas of the law.

relevance of NBTA certification. The Commission's concern about the possibility of deception in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment. Disclosure of information such as that on petitioner's letterhead both serves the public interest and encourages the development and utilization of meritorious certification programs for attorneys. As the public censure of petitioner for violating Rule 2–105(a)(3) violates the First Amendment, the judgment of the Illinois Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, concurring in the judgment.

Petitioner's letterhead is neither actually nor inherently misleading. I therefore concur in the plurality's holding that Illinois may not prohibit petitioner from holding himself out as a civil trial specialist certified by the National Board of Trial Advocacy (NBTA). I believe, though, that petitioner's letterhead statement is potentially misleading. Accordingly, I would hold that Illinois may enact regulations other than a total ban to ensure that the public is not misled by such representations. Because Illinois' present regulation is unconstitutional as applied to petitioner, however, the judgment of the Illinois Supreme Court must be reversed and the case remanded for further proceedings.

The scope of permissible regulation depends on the nature of the commercial speech in question. States may prohibit actually or inherently misleading commercial speech entirely. *In re R. M. J.*, 455 U. S. 191, 203 (1982). They may not, however, ban *potentially* misleading commercial speech if narrower limitations could be crafted to ensure that the information is presented in a nonmisleading manner. *Ibid.*

I agree with the plurality that petitioner's reference to his NBTA certification as a civil trial specialist is not actually

misleading. *Ante*, at 105–106. The record contains no evidence that any recipient of petitioner's stationery actually has been misled by the statement. I also believe that petitioner's letterhead statement is not inherently misleading such that it may be banned outright. The Court has upheld such a ban only when the particular method by which the information is imparted to consumers is inherently conducive to deception and coercion. In *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978), the Court upheld a prophylactic ban on a lawyer's in-person solicitation of clients for pecuniary gain because such solicitation "is inherently conducive to overreaching and other forms of misconduct." *Id.*, at 464. A statement on a letterhead, however, does not raise the same concerns as face-to-face barratry because the recipient of a letter does not have "a badgering advocate breathing down his neck" and can take time to reflect on the information provided to him. *Shapero* v. *Kentucky Bar Assn.*, 486 U. S. 466, 475–476 (1988). The Court has also suggested that commercial speech that is devoid of intrinsic meaning may be inherently misleading, especially if such speech historically has been used to deceive the public. *In re R. M. J.*, *supra*, at 202 (citing *Friedman* v. *Rogers*, 440 U. S. 1 (1979), which upheld a ban on the use of trade names by optometrists). The statement about petitioner's NBTA certification does not fit this category, as it does impart some information and as the State has made no showing that similar claims have been used to deceive. Illinois therefore may not prohibit petitioner from including the statement in his letterhead.

The statement is nonetheless *potentially* misleading. The name "National Board of Trial Advocacy" could create the misimpression that the NBTA is an agency of the Federal Government. Although most lawyers undoubtedly know that the Federal Government does not regulate lawyers, most nonlawyers probably do not; thus, the word "National" in the NBTA's name does not dispel the potential implication

that the NBTA is a governmental agency. Furthermore, the juxtaposition on petitioner's letterhead of the phrase "Certified Civil Trial Specialist By the National Board of Trial Advocacy" with "Licensed: Illinois, Missouri, Arizona" could lead even lawyers to believe that the NBTA, though not a governmental agency, is somehow sanctioned by the States listed on the letterhead. Cf. *post*, at 123 (O'CONNOR, J., dissenting).

The plurality's assertion that the letterhead is unlikely to mislead a person to think that the NBTA is in some way affiliated with the Government is founded on the assumption that people understand that licenses are issued by governmental authorities, whereas certificates are issued by private organizations. *Ante*, at 103–104. But the dictionary definition of "certificate" relied on by the plurality in fact suggests that "certified" will often be understood as connoting governmental authorization:

> "[A] document issued by a school, *a state agency, or* a professional organization certifying that one has satisfactorily completed a course of studies, has passed a qualifying examination, *or has attained professional standing in a given field and may officially practice or hold a position in that field.*" Webster's Third New International Dictionary 367 (1986 ed.) (emphases added). See also *ibid.* (defining "certify" as, *inter alia*, "license").

Indeed, this interpretation accords with many States' practice of certifying legal specialists, see *post*, at 124 (O'CONNOR, J., dissenting), and other professionals. For instance, many States prescribe requirements for, and "certify" public accountants as, "Certified Public Accountants." See, *e. g.*, Ill. Rev. Stat., ch. 111, ¶5500.01 *et seq.* (1987 and Supp. 1988). See also Webster's, *supra*, at 367 (defining "certified public accountant" as "an accountant usu[ally] in professional public practice who has met the requirements of a state law and has been granted a state certificate"). The phrase "Cer-

tified Civil Trial Specialist By the National Board of Trial Advocacy," without further explanation, is thus potentially misleading, at least when placed in proximity to petitioner's listing of his licenses to practice law in three States. Cf. *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, 652 (1985) (holding that attorney advertisement promising "if there is no recovery, no legal fees are owed by our clients" was potentially misleading because "members of the public are often unaware of the technical meanings of such terms as 'fees' and 'costs'—terms that, in ordinary usage, might well be virtually interchangeable").

In addition, the reference to petitioner's certification as a civil trial specialist may cause people to think that petitioner is necessarily a better trial lawyer than attorneys without the certification. Cf. *post*, at 123 (O'CONNOR, J., dissenting). We have recognized that "advertising claims as to the quality of services . . . are not susceptible of measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction." *Bates* v. *State Bar of Ariz.*, 433 U. S. 350, 383–384 (1977). The plurality discounts the misleading nature of the reference in two ways. First, it asserts that the reference to NBTA certification is not an opinion, but a verifiable fact, and that the requirements for certification are also verifiable facts. *Ante*, at 101. Second, it suggests that any inference of superiority that a consumer draws from the reference is justified, *ante*, at 102, apparently because it believes that anyone who passes the NBTA's "'rigorous and exacting'" standards possesses exceptional qualifications, *ante*, at 95 (quoting *In re Johnson*, 341 N. W. 2d 282, 283 (Minn. 1983)). Whereas certification as a specialist by a "bogus" organization without "objective and consistently applied standards relevant to practice in a particular area of law" might be misleading, the plurality argues, *ante*, at 109, NBTA certification suggests no "greater degree of professional qualification than reasonably may be inferred from an evaluation of its rigorous requirements," *ante*, at 102.

Although these characteristics may buttress the plurality's conclusion that petitioner's letterhead statement is not *inherently* misleading, they do not prevent that statement from being *potentially* misleading. Facts as well as opinions can be misleading when they are presented without adequate information. Even if, as the plurality suggests, NBTA-certified lawyers are *generally* more highly qualified for trial work than the average attorney, petitioner's statement is still potentially misleading because a person reasonably could draw a different inference from it. A person could think, for instance, that "Certified Civil Trial Specialist" means that petitioner has an unusually high success rate in civil trials. Alternatively, a person could think that all lawyers are considered by the NBTA for certification as a specialist, so that petitioner is *necessarily* a better trial lawyer than every lawyer not so certified. Neither inference, needless to say, would be true.

The potential for misunderstanding might be less if the NBTA were a commonly recognized organization and the public had a general understanding of its requirements. The record contains no evidence, however, that the NBTA or, more importantly, its certification requirements are widely known.

This Court examined a statement similar to petitioner's in *In re R. M. J.* There, an attorney had been disciplined by the state bar for advertising, among other things, that he was "Admitted to Practice Before THE UNITED STATES SUPREME COURT." 455 U. S., at 197. We found that "this relatively uninformative fact . . . could be misleading to the general public unfamiliar with the requirements of admission to the Bar of this Court." *Id.*, at 205. We held that the State's total ban on such information was unconstitutional, however, in part because the state court had made no finding that the information was misleading; nor had the State attempted a less restrictive means of preventing deception,

such as "requir[ing] a statement explaining the nature of the Supreme Court Bar." *Id.*, at 206. Nevertheless, our acknowledgment that the statement was *potentially* misleading and our suggestion that the State could require the attorney to provide additional information are instructive.

Because a claim of certification by the NBTA as a civil trial specialist is potentially misleading, States may enact measures other than a total ban to prevent deception or confusion. This Court has suggested that States may, for example, require "some limited supplementation, by way of warning or disclaimer or the like, . . . so as to assure that the consumer is not misled." *Bates*, *supra*, at 384. Accord, *In re R. M. J.*, *supra*, at 203 ("[T]he remedy in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or explanation"). The Court's decisions in *Shapero* and *Zauderer* provide helpful guidance in this area. In *Shapero*, the Court held that States may not categorically prohibit lawyers from soliciting business for pecuniary gain by sending personalized letters to potential clients known to face particular legal problems. 486 U. S., at 476. The Court said that States could, however, enact less restrictive measures to prevent deception and abuse, such as requiring that a personalized letter bear a label identifying it as an advertisement or a statement informing the recipient how to report an inaccurate or misleading letter. *Id.*, at 477–478. In *Zauderer*, the Court held that a State could not ban newspaper advertisements containing legal advice or illustrations because the State had failed to show that it could not combat potential abuses by means short of a blanket ban. 471 U. S., at 644, 648–649. But the Court held that the State could require attorneys advertising contingent-fee services to disclose that clients would have to pay costs even if their lawsuits were unsuccessful to prevent the possibility that people would erroneously think that they would not owe their attorneys any money if they lost their cases. *Id.*, at 650–653.

Following the logic of those cases, a State could require a lawyer claiming certification by the NBTA as a civil trial specialist to provide additional information in order to prevent that claim from being misleading.[1] The State might, for example, require a disclaimer stating that the NBTA is a private organization not affiliated with, or sanctioned by, the State or Federal Government. The State also could require information about the NBTA's requirements for certification as a specialist so that any inferences drawn by consumers about the quality of services offered by an NBTA-certified attorney would be based on more complete knowledge of the meaning of NBTA certification. Each State, of course, may decide for itself, within the constraints of the First Amendment, how best to prevent such claims from being misleading.[2]

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[1] JUSTICE O'CONNOR suggests that any regulation short of a total ban on claims such as petitioner's would require "case-by-case review" of each certification claim and would be unduly burdensome on the State. *Post*, at 125. On the contrary, a State could easily establish generally applicable regulations setting forth what types of information must accompany a claim of certification or specialty. The state agency in charge of enforcing those regulations could then investigate and adjudicate alleged violations of the regulations, just as such agencies do under existing disciplinary rules. No advance approval of every claim would be required.

In any event, this Court's primary task in cases such as this is to determine whether a state law or regulation unduly burdens the speaker's exercise of First Amendment rights, not whether respect for those rights would be unduly burdensome for the State. Because Illinois can prevent petitioner's claim from being misleading without banning that claim entirely, the State's total ban is unconstitutional *as applied in this case*. Cf. *post*, at 118–119 (WHITE, J., dissenting). The burden is on the State to enact a constitutional regulation, not on petitioner to guess in advance what he would have to do to comply with such a regulation.

[2] The precise amount of information necessary to avoid misunderstandings need not be decided here. The poles of the spectrum of disclosure requirements, however, are clear. A State may require an attorney to provide more than just the fact of his certification as a civil trial specialist by the NBTA. But a State may not require an attorney to include in his letterhead an exhaustive, detailed recounting of the NBTA's certification requirements because more limited disclosure would suffice to prevent the

JUSTICE WHITE, dissenting.

I agree with JUSTICE MARSHALL that petitioner's letterhead is potentially misleading and with the reasons he gives for this conclusion. Thus, there are four Justices—JUSTICE STEVENS and the three Justices joining his opinion—who believe that the First Amendment protects the letterhead as it is and that the State may not forbid its circulation. But there are five Justices who believe that this particular letterhead is unprotected: JUSTICE O'CONNOR, THE CHIEF JUSTICE, and JUSTICE SCALIA believe the letterhead is inherently misleading and hence would uphold Rule 2–105(a)(3) of the Illinois Code of Professional Responsibility; at least two of us—JUSTICE MARSHALL and myself—find it potentially misleading and would permit the State to ban such letterheads but only if they are not accompanied by disclaimers appropriate to avoid the danger. This letterhead does not carry such a disclaimer. The upshot is that while the State may not apply its flat ban to any and all claims of certification by attorneys, particularly those carrying disclaimers, the State should be allowed to apply its Rule to the letterhead in its present form and forbid its circulation. That leads me to affirm, rather than to reverse, the judgment below.

To reverse is to leave petitioner free to circulate his letterhead, not because it is protected under the First Amendment—indeed, it is not—but because five Justices refuse to enforce the Rule even as applied, leaving the State powerless to act unless it drafts a narrower rule that will survive scrutiny under the First Amendment. This is nothing less than a

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possibility that people would be misled. Cf. *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, 663–664 (1985) (BRENNAN, J., concurring in part, concurring in judgment in part, and dissenting in part) ("[C]ompelling the publication of detailed fee information that would fill far more space than the advertisement itself . . . would chill the publication of protected commercial speech and would be entirely out of proportion to the State's legitimate interest in preventing potential deception").

brand of overbreadth, a doctrine that has little if any place in considering the validity of restrictions on commercial speech, which is what is involved in this case. *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 380–381 (1977). *Bates* "established the nonapplicability of overbreadth analysis to commercial speech." *Board of Trustees of State University of N. Y.* v. *Fox*, 492 U. S. 469, 483 (1989); accord, *Shapero* v. *Kentucky Bar Assn.*, 486 U. S. 466, 478 (1988); *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 463, n. 20 (1978). This being so, the inquiry is not whether the regulation at issue here is invalid on its face, but whether it was constitutionally applied to forbid circulation of the letterhead in its present form. It is plain enough that it was so applied, for five of us hold that the letterhead is at least potentially misleading and hence must carry an appropriate disclaimer to qualify for circulation. As I see it, it is petitioner who should have to clean up his advertisement so as to eliminate its potential to mislead. Until he does, the State's Rule legally bars him from circulating the letterhead in its present form.

I would therefore affirm the judgment.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

This case provides yet another example of the difficulties raised by rote application of the commercial speech doctrine in the context of state regulation of professional standards for attorneys. Nothing in our prior cases in this area mandates that we strike down the state regulation at issue here, which is designed to ensure a reliable and ethical profession. Failure to accord States considerable latitude in this area embroils this Court in the micromanagement of the State's inherent authority to police the ethical standards of the profession within its borders.

Petitioner argues for the first time before this Court that the statement on his letterhead that he is a certified trial specialist is not commercial speech. I agree with the plurality that we need not reach this issue in this case. *Ante*, at 99–100. We

generally do not "decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale* v. *Louisiana*, 394 U. S. 437, 438 (1969).

We recently summarized our standards for commercial speech by attorneys in *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626 (1985):

> "The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading, see *Friedman* v. *Rogers*, 440 U. S. 1 (1979) . . . . Commercial speech that is not false or deceptive and does not concern unlawful activities . . . may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest." *Id.*, at 638.

In my view, application of this standard requires us to affirm the Illinois Supreme Court's decision that Rule 2–105(a)(3) of the Illinois Code of Professional Responsibility is a valid measure to control misleading and deceptive speech. "The public's comparative lack of knowledge, the limited ability of the professions to police themselves, and the absence of any standardization in the 'product' renders [attorney commercial speech] especially susceptible to abuses that the States have a legitimate interest in controlling." *In re R. M. J.*, 455 U. S. 191, 202 (1982). Although certifying organizations, such as the National Board of Trial Advocacy (NBTA), may provide a valuable service to the legal profession and the public, I would permit the States broad latitude to ensure that consumers are not misled or deceived by claims of certification.

In *In re R. M. J.*, *supra*, the Court stated that it "has made clear . . . that regulation—and imposition of discipline—are permissible where the particular advertising is inherently likely to deceive *or* where the record indicates that a particular form or method of advertising has in fact been deceptive." *Ibid.* (emphasis added). The plurality in this case correctly notes that the statements in petitioner's letterhead have not been shown actually to deceive consumers, see *ante*,

at 100–101, but it fails adequately to address whether the statements are "inherently likely to deceive," as the Supreme Court of Illinois concluded. *In re Peel*, 126 Ill. 2d 397, 408, 534 N. E. 2d 980, 985 (1989). Charged with the duty of monitoring the legal profession within the State, the Supreme Court of Illinois is in a far better position than is this Court to determine which statements are misleading or likely to mislead. Although we are the final arbiters on the issue whether a statement is misleading as a matter of constitutional law, we should be more deferential to the State's experience with such statements. Illinois does not stand alone in its conclusion that claims of certification are so misleading as to require a blanket ban. At least 19 States and the District of Columbia currently ban claims of certification. See Alaska Code Prof. Resp. DR 2–105 (1990); D. C. Ct. Rules, App. A., DR 2–105 (1989); Haw. Code Prof. Resp. DR 2–105 (1990); Ill. Code Prof. Resp. Rule 2–105 (1989); Ind. Rule Prof. Conduct 7.4 (1990); Iowa Code Prof. Resp. DR 2–105 (1989); Ky. Sup. Ct. Rule 7.4 (1990–1991); Md. Rule Prof. Conduct 7.4 (1990); Mass. Sup. Judicial Ct. Rule DR 2–105 (1990); Miss. Rule Prof. Conduct 7.4 (1989); Mo. Sup. Ct. Rule Prof. Conduct 7.4 (1990); Nev. Sup. Ct. Rule Prof. Conduct 198 (1990); Ore. Code Prof. Resp. DR 2–105 (1990); Pa. Rule Prof. Conduct 7.4 (1989); S. D. Rule Prof. Conduct 7.4 (1989); Tenn. Sup. Ct. Rule DR 2–105 (1988–1989); Va. Sup. Ct. Rules, pt. 6, § 2, DR 2–104 (1989); Wash. Rule Prof. Conduct 7.4 (1990); W. Va. Rule Prof. Conduct 7.4 (1990); Wis. Sup. Ct. Rule Prof. Conduct 20:7.4 (1989).

Despite the veracity of petitioner's claim of certification by the NBTA, such a claim is inherently likely to deceive the public. The plurality states that "[a] claim of certification is not an unverifiable opinion of the ultimate quality of a lawyer's work or a promise of success, . . . but is simply a fact." *Ante*, at 101 (citation omitted). This view, however, conflates fact and verifiability. Merely because something is a fact does not make it readily verifiable. A statement, even if

true, could be misleading. See also *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 383 (1977) (attorney commercial speech "that is false, deceptive, *or* misleading of course is subject to restraint" (emphasis added)). The ordinary consumer with a "comparative lack of knowledge" about legal affairs should be able to assess the validity of claims and statements made in attorney advertising. Neither petitioner nor the plurality asserts that petitioner's claim of certification on its face is readily understandable to the average consumer of legal services.

The plurality verifies petitioner's statement on his letterhead by reference to the record assembled in this case, but that record is not readily available to members of the public. Given the confusion in the court below about the certification standard applied by the NBTA, see 126 Ill. 2d, at 406, 534 N. E. 2d, at 984, there can be little doubt that the meaning underlying a claim of NBTA certification is neither common knowledge nor readily verifiable by the ordinary consumer. And nothing in petitioner's letterhead reveals how one might attempt to verify the claim of certification by the NBTA. At least the claim of admission to the United States Supreme Court at issue in *In re R. M. J.*, *supra*, which the Court stated "could be misleading," 455 U. S., at 205–206, named a readily recognizable institution or location to which inquiries could be addressed. Reference to the "NBTA" provides no such guidepost for inquiries. The State is, in my view, more than justified in banning claims of certification by the NBTA.

The plurality appears to have abandoned altogether any requirement that a statement or claim be verifiable by the ordinary consumer of legal services. Apparently, it would permit advertising claims of certification by any organization so long as the lawyer can "demonstrate that such certification is available to all lawyers who meet objective and consistently applied standards relevant to practice in a particular area of the law." *Ante*, at 109. The plurality has thereby deserted the sole policy reason that justifies its headlong plunge into

micromanagement of state bar rules—facilitation of a "consumer's access to legal services." *Ante*, at 110. Facilitation of access to legal services is hardly achieved where the consumer neither knows the organization nor can readily verify its criteria for membership.

"[A]dvertising claims as to the quality of services . . . are not susceptible of measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction." *Bates*, *supra*, at 383–384; see also *In re R. M. J.*, *supra*, at 201 ("[C]laims as to quality . . . might be so likely to mislead as to warrant restriction"). As the Supreme Court of Illinois properly concluded, certification is tantamount to a claim of quality and superiority and is therefore inherently likely to mislead. 126 Ill. 2d, at 410, 534 N. E. 2d, at 986. Indeed, the plurality's citation of others' descriptions of NBTA certification supports the conclusion that it is intended to attest to the quality of the lawyer's work. The plurality refers to the Task Force on Lawyer Competence of the Conference of Chief Justices, Report with Findings and Recommendations to the Conference of Chief Justices, Publication No. NCSC–021, (May 26, 1982), which stated: "The National Board of Trial Advocacy, a national certification program that provides recognition for *superior achievement in trial advocacy*, uses a highly-structured certification process in addition to a formal examination to select its members." *Id.*, at 33–34 (emphasis added).

Not only does the certification claim lead the consumer to believe that this lawyer is better than those lawyers lacking such certification, it also leads to the conclusion that the State licenses the lawyer's purported superiority. The juxtaposition on petitioner's letterhead of "Licensed: Illinois, Missouri, Arizona" with the claim of NBTA certification increases the likelihood of deception. As the court below reasoned, 126 Ill. 2d, at 406, 534 N. E. 2d, at 984, the proximity of the two statements might easily lead the consumer to conclude that the State has sanctioned the certification. As it is

common knowledge that States police the ethical standards of the profession, that inference is likely to be especially misleading. The plurality disposes of this difficulty by drawing an unconvincing distinction between licensing and certification: "We are satisfied that the consuming public understands that licenses . . . are issued by governmental authorities and that a host of certificates . . . are issued by private organizations." *Ante*, at 103. Yet, no such bright line exists. For example, California is now certifying legal specialists. See Cal. Rules Ct., Policies Governing the State Bar of California Program for Certifying Legal Specialists (1990). See also Ariz. Rule Prof. Conduct ER 7.4 (1990); Ark. Model Rule Prof. Conduct 7.4(c) (1990); Fla. Rule Prof. Conduct 4–7.5(c) (1990); La. Rev. Stat. Ann., Rule of Prof. Conduct 7.4 (1988); N. J. Ct. Rule 1:39 and N. J. Rule Prof. Conduct 7.4 (1989); N. M. Rules Governing Practice of Law, Rule of Prof. Conduct 16–704 (1988); N. C. Ann. Rules, Plan of Certified Legal Specialization, App. H, Rule 5.7 (1989); S. C. Rules on Lawyer Advertising, Ct. Rule 7.4 (Supp. 1989); Tex. State Bar Rules, Art. 10, § 9, DR 2–101(C) (1989); Utah Rule Prof. Conduct 7.4(b) (1990). Thus, claims of certification may well lead the ordinary consumer to conclude that the State has sanctioned such a claim. "[B]ecause the public lacks sophistication concerning legal services," "the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the [attorney commercial speech] arena." *Bates*, *supra*, at 383. The Supreme Court of Illinois did not err when it concluded that the ordinary consumer is likely to be misled by the juxtaposition of state bar admission and claims of civil trial specialty. Because the statement of certification on petitioner's letterhead is inherently misleading, the State may prohibit it without violation of the First Amendment. See *In re R. M. J.*, *supra*, at 203 ("Misleading advertising may be prohibited entirely").

Petitioner does not suggest a less burdensome means of regulating attorney claims of certification than case-by-case

determination. Under petitioner's theory, the First Amendment requires States that would protect their consumers from misleading claims of certification to provide an individual hearing for each and every claim of certification, extending well beyond NBTA certification to any organization that may be used by a resourceful lawyer. In my view, the First Amendment does not require the State to establish such an onerous system and permits the State simply to prohibit such inherently misleading claims.

As a majority of this Court agree, see *ante*, at 111 (MARSHALL, J., concurring in judgment, joined by BRENNAN, J.); *ante*, at 118 (WHITE, J., dissenting); *supra*, at 121–124 (O'CONNOR, J., dissenting, joined by REHNQUIST, C. J., and SCALIA, J.), petitioner's claim to certification is at least potentially misleading. If the information cannot be presented in a way that is not deceptive, even statements that are merely potentially misleading may be regulated with an absolute prohibition. See *In re R. M. J.*, 455 U. S., at 203. It is difficult to believe that a disclaimer could be fashioned, as the plurality suggests, *ante*, at 110; see also opinion concurring in judgment, *ante*, at 117, that would make petitioner's claim of certification on his letterhead not potentially misleading. Such a disclaimer would have to communicate three separate pieces of information in a space that could reasonably fit on a letterhead along with the claim of certification: (1) that the claim to certification does not necessarily indicate that the attorney provides higher quality representation than those who are not certified; (2) that the certification is not state sanctioned; and (3) either the criteria for certification or a reasonable means by which the consumer could determine what those criteria are. Even if the State were to permit claims of certification along with disclaimers, in order to protect consumers adequately, the State would have to engage in case-by-case review to ensure that the misleading character of a particular claim to certification was cured by a particular disclaimer. Alternatively, the State would be forced

to fashion its own disclaimer for each organization for which certification is claimed by the attorneys within its borders, provide for certification itself, or, at the least, screen each organization. See, *e. g.*, Ala. Code Prof. Resp. Temp. DR 2–112 (1989) (providing for state screening of certifying organizations). Although having information about certification may be helpful for consumers, the Constitution does not require States to go to these extremes to protect their citizens from deception. In my view, the Court would do well to permit the States broad latitude to experiment in this area so as to allow such forms of disclosure as best serve each State's legitimate goal of assisting its citizens in obtaining the most reliable information about legal services.

Petitioner also contends that Rule 2–105 violates the Equal Protection Clause as applied to him on the ground that there is no rational justification for allowing attorneys in certain areas to claim specialization, *e. g.*, admiralty, patent, and trademark, while precluding him from claiming a civil trial specialty. Yet, petitioner's claim is not merely a claim of concentration of practice, which the Illinois rules permit, but rather a claim of quality. It is not irrational for the State to assume that the reporting of professional experience is less likely to mislead the public than would claims of quality. Moreover, while the claim of NBTA certification is misleading in part because the public does not know what meaning to attach to it, the claim of concentration of practice merely states a fact understandable on its face to the ordinary consumer. Finally, as the Supreme Court of Illinois noted, historically lawyers have been permitted to advertise specialization in patent, trademark, and admiralty law because of the difficulties encountered by the general public in finding such attorneys. See 126 Ill. 2d, at 410–411, 534 N. E. 2d, at 986. Locating an attorney who is a civil trial advocate hardly poses the same obstacle. Thus, I would conclude that the regulation does not violate the Equal Protection Clause.

For the foregoing reasons, I would uphold Rule 2–105(a)(3) of the Illinois Code of Professional Responsibility and affirm the decision of the court below.

HORTON *v.* CALIFORNIA

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SIXTH APPELLATE DISTRICT

No. 88–7164. Argued February 21, 1990—Decided June 4, 1990

A California policeman determined that there was probable cause to search petitioner Horton's home for the proceeds of a robbery and the robbers' weapons. His search warrant affidavit referred to police reports that described both the weapons and the proceeds, but the warrant issued by the Magistrate only authorized a search for the proceeds. Upon executing the warrant, the officer did not find the stolen property but did find the weapons in plain view and seized them. The trial court refused to suppress the seized evidence, and Horton was convicted of armed robbery. The California Court of Appeal affirmed. Since the officer had testified that while he was searching Horton's home for the stolen property he was also interested in finding other evidence connecting Horton to the robbery, the seized evidence was not discovered "inadvertently." However, in rejecting Horton's argument that *Coolidge* v. *New Hampshire*, 403 U. S. 443, therefore required suppression of that evidence, the Court of Appeal relied on a State Supreme Court decision holding that *Coolidge*'s discussion of the inadvertence limitation on the "plain-view" doctrine was not binding because it was contained in a four-Justice plurality opinion.

Held: The Fourth Amendment does not prohibit the warrantless seizure of evidence in plain view even though the discovery of the evidence was not inadvertent. Although inadvertence is a characteristic of most legitimate plain-view seizures, it is not a necessary condition. Pp. 133–142.

(a) *Coolidge* is a binding precedent. However, the second of the *Coolidge* plurality's two limitations on the plain-view doctrine—that the discovery of evidence in plain view must be inadvertent, *id.*, at 469—was not essential to the Court's rejection of the State's plain-view argument in that case. Rather, the first limitation—that plain view *alone* is never enough to justify a warrantless seizure, *id.*, at 468—adequately supports the Court's holding that gunpowder found in vacuum sweepings from one of the automobiles seized in plain view on the defendant's driveway in the course of his arrest could not be introduced against him because the warrantless seizures violated the Fourth Amendment. In order for a warrantless seizure of an object in plain view to be valid, two conditions must be satisfied in addition to the essential predicate that the officer did not violate the Fourth Amendment in arriving at the place from which

the object could be plainly viewed. First, the object's incriminating character must be "immediately apparent," *id.*, at 466. Although the cars in *Coolidge* were obviously in plain view, their probative value remained uncertain until after their interiors were swept and examined microscopically. Second, the officer must have a lawful right of access to the object itself. Justice Harlan, who concurred in the *Coolidge* judgment but did not join the plurality's plain-view discussion, may well have rested his vote on the fact that the cars' seizure was accomplished by means of a warrantless trespass on the defendant's property. Pp. 133–137.

(b) There are two flaws in the *Coolidge* plurality's conclusion that the inadvertence requirement was necessary to avoid a violation of the Fourth Amendment's mandate that a valid warrant " 'particularly describ[e] . . . [the] . . . things to be seized,' " *id.*, at 469–471. First, evenhanded law enforcement is best achieved by applying objective standards of conduct, rather than standards that depend upon the officer's subjective state of mind. The fact that an officer is interested in an item and fully expects to find it should not invalidate its seizure if the search is confined in area and duration by a warrant's terms or by a valid exception to the warrant requirement. Second, the suggestion that the inadvertence requirement is necessary to prevent the police from conducting general searches, or from converting specific warrants into general warrants, is not persuasive because that interest is already served by the requirements that an unparticularized warrant not be issued and that a warrantless search be circumscribed by the exigencies which justify its initiation. Here, the search's scope was not enlarged by the warrant's omission of reference to the weapons; indeed, no search for the weapons could have taken place if the named items had been found or surrendered at the outset. The prohibition against general searches and warrants is based on privacy concerns, which are not implicated when an officer with a lawful right of access to an item in plain view seizes it without a warrant. Pp. 137–142.

Affirmed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 142.

Juliana Drous, by appointment of the Court, 493 U. S. 952, argued the cause and filed briefs for petitioner.

Martin S. Kaye, Supervising Deputy Attorney General of California, argued the cause for respondent. With him on the brief were *John K. Van de Kamp*, Attorney General,

Richard B. Iglehart, Chief Assistant Attorney General, *John H. Sugiyama*, Senior Assistant Attorney General, and *Clifford K. Thompson, Jr.*, Deputy Attorney General.*

JUSTICE STEVENS delivered the opinion of the Court.

In this case we revisit an issue that was considered, but not conclusively resolved, in *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971): Whether the warrantless seizure of evidence of crime in plain view is prohibited by the Fourth Amendment if the discovery of the evidence was not inadvertent. We conclude that even though inadvertence is a characteristic of most legitimate "plain-view" seizures, it is not a necessary condition.

I

Petitioner was convicted of the armed robbery of Erwin Wallaker, the treasurer of the San Jose Coin Club. When Wallaker returned to his home after the Club's annual show, he entered his garage and was accosted by two masked men, one armed with a machine gun and the other with an electrical shocking device, sometimes referred to as a "stun gun." The two men shocked Wallaker, bound and handcuffed him, and robbed him of jewelry and cash. During the encounter sufficient conversation took place to enable Wallaker subsequently to identify petitioner's distinctive voice. His identification was partially corroborated by a witness who saw the robbers leaving the scene and by evidence that petitioner had attended the coin show.

Sergeant LaRault, an experienced police officer, investigated the crime and determined that there was probable cause to search petitioner's home for the proceeds of the rob-

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*Briefs of *amici curiae* urging affirmance were filed for the United States by *Solicitor General Starr*, *Assistant Attorney General Dennis*, *Deputy Solicitor General Bryson*, and *Brian J. Martin*; and for Americans for Effective Law Enforcement, Inc., et al. by *Gregory U. Evans*, *Daniel B. Hales*, *George D. Webster*, *Jack E. Yelverton*, *Fred E. Inbau*, *Wayne W. Schmidt*, *Bernard J. Farber*, and *James P. Manak*.

bery and for the weapons used by the robbers. His affidavit for a search warrant referred to police reports that described the weapons as well as the proceeds, but the warrant issued by the Magistrate only authorized a search for the proceeds, including three specifically described rings.

Pursuant to the warrant, LaRault searched petitioner's residence, but he did not find the stolen property. During the course of the search, however, he discovered the weapons in plain view and seized them. Specifically, he seized an Uzi machine gun, a .38-caliber revolver, two stun guns, a handcuff key, a San Jose Coin Club advertising brochure, and a few items of clothing identified by the victim.[1] LaRault testified that while he was searching for the rings, he also was interested in finding other evidence connecting petitioner to the robbery. Thus, the seized evidence was not discovered "inadvertently."

The trial court refused to suppress the evidence found in petitioner's home and, after a jury trial, petitioner was found guilty and sentenced to prison. The California Court of Appeal affirmed. App. 43. It rejected petitioner's argument that our decision in *Coolidge* required suppression of the seized evidence that had not been listed in the warrant because its discovery was not inadvertent. App. 52–53. The court relied on the California Supreme Court's decision in *North* v. *Superior Court*, 8 Cal. 3d 301, 502 P. 2d 1305 (1972). In that case the court noted that the discussion of the inadvertence limitation on the "plain-view" doctrine in Justice Stewart's opinion in *Coolidge* had been joined by only three other Members of this Court and therefore was not binding on it.[2] The California Supreme Court denied petitioner's request for review. App. 78.

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[1] Although the officer viewed other handguns and rifles, he did not seize them because there was no probable cause to believe they were associated with criminal activity. App. 30; see *Arizona* v. *Hicks*, 480 U. S. 321, 327 (1987).

[2] "In *Coolidge*, the police arrested a murder suspect in his house and thereupon seized his automobile and searched it later at the police station,

Because the California courts' interpretation of the "plain-view" doctrine conflicts with the view of other courts,[3] and because the unresolved issue is important, we granted certiorari, 493 U. S. 889 (1989).

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finding physical evidence that the victim had been inside the vehicle. The record disclosed that the police had known for some time of the probable role of the car in the crime, and there were no 'exigent circumstances' to justify a warrantless search. Accordingly, the plurality opinion of Justice Stewart concluded that the seizure could not be justified on the theory that the vehicle was itself the 'instrumentality' of the crime and was discovered 'in plain view' of the officers. Justice Stewart was of the opinion that the 'plain-view' doctrine is applicable only to the *inadvertent* discovery of incriminating evidence.

"If the plurality opinion in *Coolidge* were entitled to binding effect as precedent, we would have difficulty distinguishing its holding from the instant case, for the discovery of petitioner's car was no more 'inadvertent' than in *Coolidge*. However, that portion of Justice Stewart's plurality opinion which proposed the adoption of new restrictions to the 'plain-view' rule was signed by only four members of the court (Stewart, J., Douglas, J., Brennan, J., and Marshall, J.). Although concurring in the judgment, Justice Harlan declined to join in that portion of the opinion, and the four remaining justices expressly disagreed with Justice Stewart on this point." *North* v. *Superior Court*, 8 Cal. 3d, at 307–308, 502 P. 2d, at 1308 (citations omitted).

[3] See, *e. g.*, *Wolfenbarger* v. *Williams*, 826 F. 2d 930 (CA10 1987); *United States* v. *$10,000 in United States Currency*, 780 F. 2d 213 (CA2 1986); *United States* v. *Roberts*, 644 F. 2d 683 (CA8), cert. denied, 449 U. S. 821 (1980); *United States* v. *Antill*, 615 F. 2d 648 (CA5 1980); *Terry* v. *State*, 271 Ark. 715, 610 S. W. 2d 272 (App. 1981); *State* v. *Johnson*, 17 Wash. App. 153, 561 P. 2d 701 (1977); *Commonwealth* v. *Cefalo*, 381 Mass. 319, 409 N. E. 2d 719 (1980); *State* v. *Sanders*, 431 So. 2d 1034 (Fla. App. 1983); *State* v. *Galloway*, 232 Kan. 87, 652 P. 2d 673 (1982); *Clark* v. *State*, 498 N. E. 2d 918 (Ind. 1986); *State* v. *Eiseman*, 461 A. 2d 369, 380 (R. I. 1983); *State* v. *McColgan*, 631 S. W. 2d 151 (Tenn. Crim. App. 1981); *Tucker* v. *State*, 620 P. 2d 1314 (Okla. Crim. App. 1980); *State* v. *Dingle*, 279 S. C. 278, 306 S. E. 2d 223 (1983). See also the cases cited in the Appendices to JUSTICE BRENNAN's dissenting opinion, *post*, at 149–153. At least two other state courts have agreed with the California Supreme Court. See *State* v. *Pontier*, 95 Idaho 707, 712, 518 P. 2d 969, 974 (1974); *State* v. *Romero*, 660 P. 2d 715 (Utah 1983).

II

The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The right to security in person and property protected by the Fourth Amendment may be invaded in quite different ways by searches and seizures. A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property. *United States* v. *Jacobsen*, 466 U. S. 109, 113 (1984). The "plain-view" doctrine is often considered an exception to the general rule that warrantless searches are presumptively unreasonable,[4] but this characterization overlooks the important difference between searches and seizures.[5] If an article is already in plain view, neither its observation nor its seizure would involve any invasion of privacy. *Arizona* v. *Hicks*,

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[4] "We reaffirm the basic rule of Fourth Amendment jurisprudence stated by Justice Stewart for a unanimous Court in *Mincey* v. *Arizona*, 437 U. S. 385, 390 [(1978)]:

"'The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz* v. *United States*, 389 U. S. 347, 357 [(1967)] (footnotes omitted).'" *United States* v. *Ross*, 456 U. S. 798, 824–825 (1982).

[5] "It is important to distinguish 'plain view,' as used in *Coolidge* to justify *seizure* of an object, from an officer's mere observation of an item left in plain view. Whereas the latter generally involves no Fourth Amendment search, see *infra*, at 740; *Katz* v. *United States*, 389 U. S. 347 (1967), the former generally does implicate the Amendment's limitations upon seizures of personal property." *Texas* v. *Brown*, 460 U. S. 730, 738, n. 4 (1983) (opinion of REHNQUIST, J.).

480 U. S. 321, 325 (1987); *Illinois* v. *Andreas*, 463 U. S. 765, 771 (1983). A seizure of the article, however, would obviously invade the owner's possessory interest. *Maryland* v. *Macon*, 472 U. S. 463, 469 (1985); *Jacobsen*, 466 U. S., at 113. If "plain view" justifies an exception from an otherwise applicable warrant requirement, therefore, it must be an exception that is addressed to the concerns that are implicated by seizures rather than by searches.

The criteria that generally guide "plain-view" seizures were set forth in *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971). The Court held that the police, in seizing two automobiles parked in plain view on the defendant's driveway in the course of arresting the defendant, violated the Fourth Amendment. Accordingly, particles of gunpowder that had been subsequently found in vacuum sweepings from one of the cars could not be introduced in evidence against the defendant. The State endeavored to justify the seizure of the automobiles, and their subsequent search at the police station, on four different grounds, including the "plain-view" doctrine.[6] The scope of that doctrine as it had developed in earlier cases was fairly summarized in these three paragraphs from Justice Stewart's opinion:

> "It is well established that under certain circumstances the police may seize evidence in plain view without a warrant. But it is important to keep in mind that, in the vast majority of cases, *any* evidence seized by the police will be in plain view, at least at the moment of seizure. The problem with the 'plain-view' doctrine has been to identify the circumstances in which plain view

[6] The State primarily contended that the seizures were authorized by a warrant issued by the attorney general, but the Court held the warrant invalid because it had not been issued by "a neutral and detached magistrate." 403 U. S., at 449–453. In addition, the State relied on three exceptions from the warrant requirement: (1) search incident to arrest; (2) the automobile exception; and (3) the "plain-view" doctrine. *Id.*, at 453–473.

has legal significance rather than being simply the normal concomitant of any search, legal or illegal.

"An example of the applicability of the 'plain-view' doctrine is the situation in which the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating character. Cf. *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, 358 [(1931)]; *United States* v. *Lefkowitz*, 285 U. S. 452, 465 [(1932)]; *Steele* v. *United States*, 267 U. S. 498 [(1925)]; *Stanley* v. *Georgia*, 394 U. S. 557, 571 [(1969)] (STEWART, J., concurring in result). Where the initial intrusion that brings the police within plain view of such an article is supported, not by a warrant, but by one of the recognized exceptions to the warrant requirement, the seizure is also legitimate. Thus the police may inadvertently come across evidence while in 'hot pursuit' of a fleeing suspect. *Warden* v. *Hayden*, [387 U. S. 294 (1967)]; cf. *Hester* v. *United States*, 265 U. S. 57 [(1924)]. And an object that comes into view during a search incident to arrest that is appropriately limited in scope under existing law may be seized without a warrant. *Chimel* v. *California*, 395 U. S. [752,] 762–763 [(1969)]. Finally, the 'plain-view' doctrine has been applied where a police officer is not searching for evidence against the accused, but nonetheless inadvertently comes across an incriminating object. *Harris* v. *United States*, 390 U. S. 234 [(1968)]; *Frazier* v. *Cupp*, 394 U. S. 731 [(1969)]; *Ker* v. *California*, 374 U. S. [23,] 43 [(1963)]. Cf. *Lewis* v. *United States*, 385 U. S. 206 [(1966)].

"What the 'plain-view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification—whether it be a warrant for another object,

> hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused—and permits the warrantless seizure. Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the 'plain-view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges." *Id.*, at 465–466 (footnote omitted).

Justice Stewart then described the two limitations on the doctrine that he found implicit in its rationale: First, that "plain view *alone* is never enough to justify the warrantless seizure of evidence," *id.*, at 468; and second, that "the discovery of evidence in plain view must be inadvertent." *Id.*, at 469.

Justice Stewart's analysis of the "plain-view" doctrine did not command a majority, and a plurality of the Court has since made clear that the discussion is "not a binding precedent." *Texas* v. *Brown*, 460 U. S. 730, 737 (1983) (opinion of REHNQUIST, J.). Justice Harlan, who concurred in the Court's judgment and in its response to the dissenting opinions, 403 U. S., at 473–484, 490–493, did not join the plurality's discussion of the "plain-view" doctrine. See *id.*, at 464–473. The decision nonetheless is a binding precedent. Before discussing the second limitation, which is implicated in this case, it is therefore necessary to explain why the first adequately supports the Court's judgment.

It is, of course, an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed. There are, moreover, two additional conditions that must be satisfied to justify the warrantless seizure. First, not only must the item be in plain view; its incriminating character must also be "immediately apparent." *Id.*, at 466; see also *Arizona* v.

Hicks, 480 U. S., at 326–327. Thus, in *Coolidge*, the cars were obviously in plain view, but their probative value remained uncertain until after the interiors were swept and examined microscopically. Second, not only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have a lawful right of access to the object itself.[7] As the United States has suggested, Justice Harlan's vote in *Coolidge* may have rested on the fact that the seizure of the cars was accomplished by means of a warrantless trespass on the defendant's property.[8] In all events, we are satisfied that the absence of inadvertence was not essential to the Court's rejection of the State's "plain-view" argument in *Coolidge*.

III

Justice Stewart concluded that the inadvertence requirement was necessary to avoid a violation of the express constitutional requirement that a valid warrant must particularly describe the things to be seized. He explained:

> "The rationale of the exception to the warrant requirement, as just stated, is that a plain-view seizure will not turn an initially valid (and therefore limited) search into

[7] "This is simply a corollary of the familiar principle discussed above, that no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances.' Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure. *Taylor* v. *United States*, 286 U. S. 1 [(1932)]; *Johnson* v. *United States*, 333 U. S. 10 [(1948)]; *McDonald* v. *United States*, 335 U. S. 451 [(1948)]; *Jones* v. *United States*, 357 U. S. 493, 497–498 [(1958)]; *Chapman* v. *United States*, 365 U. S. 610 [(1961)]; *Trupiano* v. *United States*, 334 U. S. 699 [(1948)]." *Coolidge*, 403 U. S., at 468.

We have since applied the same rule to the arrest of a person in his home. See *Minnesota* v. *Olson*, 495 U. S. 91 (1990); *Payton* v. *New York*, 445 U. S. 573 (1980).

[8] See Brief for United States as *Amicus Curiae* 7, n. 4.

> a 'general' one, while the inconvenience of procuring a warrant to cover an inadvertent discovery is great. But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as '*per se* unreasonable' in the absence of 'exigent circumstances.'
>
> "If the initial intrusion is bottomed upon a warrant that fails to mention a particular object, though the police know its location and intend to seize it, then there is a violation of the express constitutional requirement of 'Warrants . . . particularly describing . . . [the] things to be seized.'" 403 U. S., at 469–471.

We find two flaws in this reasoning. First, evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer. The fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is confined in area and duration by the terms of a warrant or a valid exception to the warrant requirement. If the officer has knowledge approaching certainty that the item will be found, we see no reason why he or she would deliberately omit a particular description of the item to be seized from the application for a search warrant.[9] Specification of the additional item could only permit the offi-

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[9] "If the police have probable cause to search for a photograph as well as a rifle and they proceed to seek a warrant, they could have no possible motive for deliberately including the rifle but omitting the photograph. Quite the contrary is true. Only oversight or careless mistake would explain the omission in the warrant application if the police were convinced they had probable cause to search for the photograph." *Coolidge*, 403 U. S., at 517 (WHITE, J., concurring and dissenting).

cer to expand the scope of the search. On the other hand, if he or she has a valid warrant to search for one item and merely a suspicion concerning the second, whether or not it amounts to probable cause, we fail to see why that suspicion should immunize the second item from seizure if it is found during a lawful search for the first. The hypothetical case put by JUSTICE WHITE in his concurring and dissenting opinion in *Coolidge* is instructive:

> "Let us suppose officers secure a warrant to search a house for a rifle. While staying well within the range of a rifle search, they discover two photographs of the murder victim, both in plain sight in the bedroom. Assume also that the discovery of the one photograph was inadvertent but finding the other was anticipated. The Court would permit the seizure of only one of the photographs. But in terms of the 'minor' peril to Fourth Amendment values there is surely no difference between these two photographs: the interference with possession is the same in each case and the officers' appraisal of the photograph they expected to see is no less reliable than their judgment about the other. And in both situations the actual inconvenience and danger to evidence remain identical if the officers must depart and secure a warrant." *Id.*, at 516.

Second, the suggestion that the inadvertence requirement is necessary to prevent the police from conducting general searches, or from converting specific warrants into general warrants, is not persuasive because that interest is already served by the requirements that no warrant issue unless it "particularly describ[es] the place to be searched and the persons or things to be seized," see *Maryland* v. *Garrison*, 480 U. S. 79, 84 (1987); *Steele* v. *United States No. 1*, 267 U. S. 498, 503 (1925),[10] and that a warrantless search be circum-

[10] "The Warrant Clause of the Fourth Amendment categorically prohibits the issuance of any warrant except one 'particularly describing the place to

scribed by the exigencies which justify its initiation. See, *e. g.*, *Maryland* v. *Buie*, 494 U. S. 325, 332–334 (1990); *Mincey* v. *Arizona*, 437 U. S. 385, 393 (1978). Scrupulous adherence to these requirements serves the interests in limiting the area and duration of the search that the inadvertence requirement inadequately protects. Once those commands have been satisfied and the officer has a lawful right of access, however, no additional Fourth Amendment interest is furthered by requiring that the discovery of evidence be inadvertent. If the scope of the search exceeds that permitted by the terms of a validly issued warrant or the character of the relevant exception from the warrant requirement, the subsequent seizure is unconstitutional without more. Thus, in the case of a search incident to a lawful arrest, "[i]f the police stray outside the scope of an authorized *Chimel* search they are already in violation of the Fourth Amendment, and evidence so seized will be excluded; adding a second reason for excluding evidence hardly seems worth the candle." *Coolidge*, 403 U. S., at 517 (WHITE, J., concurring and dissenting). Similarly, the object of a warrantless search of an automobile also defines its scope:

> "The scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found. Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe

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be searched and the persons or things to be seized.' The manifest purpose of this particularity requirement was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Maryland* v. *Garrison*, 480 U. S., at 84.

> that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab." *United States* v. *Ross*, 456 U. S. 798, 824 (1982).

In this case, the scope of the search was not enlarged in the slightest by the omission of any reference to the weapons in the warrant. Indeed, if the three rings and other items named in the warrant had been found at the outset—or if petitioner had them in his possession and had responded to the warrant by producing them immediately—no search for weapons could have taken place. Again, JUSTICE WHITE's concurring and dissenting opinion in *Coolidge* is instructive:

> "Police with a warrant for a rifle may search only places where rifles might be and must terminate the search once the rifle is found; the inadvertence rule will in no way reduce the number of places into which they may lawfully look." 403 U. S., at 517.

As we have already suggested, by hypothesis the seizure of an object in plain view does not involve an intrusion on privacy.[11] If the interest in privacy has been invaded, the violation must have occurred before the object came into plain view and there is no need for an inadvertence limitation on seizures to condemn it. The prohibition against general searches and general warrants serves primarily as a protection against unjustified intrusions on privacy. But reliance

[11] Even if the item is a container, its seizure does not compromise the interest in preserving the privacy of its contents because it may only be opened pursuant to either a search warrant, see *Smith* v. *Ohio*, 494 U. S. 541 (1990); *United States* v. *Place*, 462 U. S. 696, 701 (1983); *Arkansas* v. *Sanders*, 442 U. S. 753 (1979); *United States* v. *Chadwick*, 433 U. S. 1 (1977); *United States* v. *Van Leeuwen*, 397 U. S. 249 (1970); *Ex parte Jackson*, 96 U. S. 727, 733 (1878), or one of the well-delineated exceptions to the warrant requirement. See *Colorado* v. *Bertine*, 479 U. S. 367 (1987); *United States* v. *Ross*, 456 U. S. 798 (1982).

on privacy concerns that support that prohibition is misplaced when the inquiry concerns the scope of an exception that merely authorizes an officer with a lawful right of access to an item to seize it without a warrant.

In this case the items seized from petitioner's home were discovered during a lawful search authorized by a valid warrant. When they were discovered, it was immediately apparent to the officer that they constituted incriminating evidence. He had probable cause, not only to obtain a warrant to search for the stolen property, but also to believe that the weapons and handguns had been used in the crime he was investigating. The search was authorized by the warrant; the seizure was authorized by the "plain-view" doctrine. The judgment is affirmed.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

I remain convinced that Justice Stewart correctly articulated the plain-view doctrine in *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971). The Fourth Amendment permits law enforcement officers to seize items for which they do not have a warrant when those items are found in plain view and (1) the officers are lawfully in a position to observe the items, (2) the discovery of the items is "inadvertent," and (3) it is immediately apparent to the officers that the items are evidence of a crime, contraband, or otherwise subject to seizure. In eschewing the inadvertent discovery requirement, the majority ignores the Fourth Amendment's express command that warrants particularly describe not only the *places* to be searched, but also the *things* to be seized. I respectfully dissent from this rewriting of the Fourth Amendment.

I

The Fourth Amendment states:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

> searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Amendment protects two distinct interests. The prohibition against unreasonable searches and the requirement that a warrant "particularly describ[e] the place to be searched" protect an interest in privacy. The prohibition against unreasonable seizures and the requirement that a warrant "particularly describ[e] . . . the . . . things to be seized" protect a possessory interest in property.[1] See *ante*, at 133; *Texas* v. *Brown*, 460 U. S. 730, 747 (1983) (STEVENS, J., concurring in judgment). The Fourth Amendment, by its terms, declares the privacy and possessory interests to be equally important. As this Court recently stated: "Although the interest protected by the Fourth Amendment injunction against unreasonable searches is quite different from that protected by its injunction against unreasonable seizures, neither the one nor the other is of inferior worth or necessarily requires only lesser protection." *Arizona* v. *Hicks*, 480 U. S. 321, 328 (1987) (citation omitted).

The Amendment protects these equally important interests in precisely the same manner: by requiring a neutral and detached magistrate to evaluate, before the search or seizure, the government's showing of probable cause and its particular description of the place to be searched and the items to be seized. Accordingly, just as a warrantless

[1] As the majority recognizes, the requirement that warrants particularly describe the things to be seized also protects privacy interests by preventing general searches. *Ante*, at 139–141. The scope of a search is limited to those places in which there is probable cause to believe an item particularly described in the warrant might be found. A police officer cannot search for a lawnmower in a bedroom, or for an undocumented alien in a suitcase. *Ante*, at 140–141 (citing *United States* v. *Ross*, 456 U. S. 798, 824 (1982)). Similarly, once all of the items particularly described in a warrant have been found, the search must cease and no further invasion of privacy is permitted. *Ante*, at 141.

search is *per se* unreasonable absent exigent circumstances, so too a seizure of personal property is "*per se* unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized." *United States* v. *Place*, 462 U. S. 696, 701 (1983) (footnote omitted) (citing *Marron* v. *United States*, 275 U. S. 192, 196 (1927)). "Prior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights." *United States* v. *United States District Court, Eastern District of Michigan*, 407 U. S. 297, 318 (1972). A decision to invade a possessory interest in property is too important to be left to the discretion of zealous officers "engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U. S. 10, 14 (1948). "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron*, *supra*, at 196.

The plain-view doctrine is an exception to the general rule that a seizure of personal property must be authorized by a warrant. As Justice Stewart explained in *Coolidge*, 403 U. S., at 470, we accept a warrantless seizure when an officer is lawfully in a location and inadvertently sees evidence of a crime because of "the inconvenience of procuring a warrant" to seize this newly discovered piece of evidence. But "where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it," the argument that procuring a warrant would be "inconvenient" loses much, if not all, of its force. *Ibid.* Barring an exigency, there is no reason why the police officers could not have obtained a warrant to seize this evidence before entering the premises. The rationale behind the inadvertent discovery requirement is simply that we will not excuse officers

from the general requirement of a warrant to seize if the officers know the location of evidence, have probable cause to seize it, intend to seize it, and yet do not bother to obtain a warrant particularly describing that evidence. To do so would violate "the express constitutional requirement of 'Warrants . . . particularly describing . . . [the] things to be seized,'" and would "fly in the face of the basic rule that no amount of probable cause can justify a warrantless seizure." *Id.*, at 471.

Although joined by only three other Members of the Court, Justice Stewart's discussion of the inadvertent discovery requirement has become widely accepted. See *Texas* v. *Brown*, *supra*, at 746 (Powell, J., concurring in judgment) ("Whatever my view might have been when *Coolidge* was decided, I see no reason at this late date to imply criticism of its articulation of this exception. It has been accepted generally for over a decade"). Forty-six States and the District of Columbia[2] and 12 United States Courts of Appeals[3] now require plain-view seizures to be inadvertent. There has been no outcry from law enforcement officials that the inadvertent discovery requirement unduly burdens their efforts. Given that the requirement is inescapably rooted in the plain language of the Fourth Amendment, I cannot fathom the Court's enthusiasm for discarding this element of the plain-view doctrine.

The Court posits two "flaws" in Justice Stewart's reasoning that it believes demonstrate the inappropriateness of the inadvertent discovery requirement. But these flaws are illusory. First, the majority explains that it can see no reason

[2] See Appendix A, *infra*, at 149–152. Only three States—California, Idaho, and Utah—have rejected the inadvertent discovery requirement. See *People* v. *Bittaker*, 48 Cal. 3d 1046, 1076, 774 P. 2d 659, 673–674 (1989), cert. pending, No. 89–6223; *State* v. *Pontier*, 95 Idaho 707, 712, 518 P. 2d 969, 974 (1974); *State* v. *Kelly*, 718 P. 2d 385, 389, n. 1 (Utah 1986). The status of the inadvertent discovery requirement in Delaware is unclear. See, *e. g.*, *Wicks* v. *State*, 552 A. 2d 462, 465 (Del. Super. 1988).

[3] See Appendix B, *infra*, at 152–153.

why an officer who "has knowledge approaching certainty" that an item will be found in a particular location "would deliberately omit a particular description of the item to be seized from the application for a search warrant." *Ante*, at 138. But to the individual whose possessory interest has been invaded, it matters not *why* the police officer decided to omit a particular item from his application for a search warrant. When an officer with probable cause to seize an item fails to mention that item in his application for a search warrant—for whatever reason—and then seizes the item anyway, his conduct is *per se* unreasonable. Suppression of the evidence so seized will encourage officers to be more precise and complete in future warrant applications.

Furthermore, there are a number of instances in which a law enforcement officer might deliberately choose to omit certain items from a warrant application even though he has probable cause to seize them, knows they are on the premises, and intends to seize them when they are discovered in plain view. For example, the warrant application process can often be time consuming, especially when the police attempt to seize a large number of items. An officer interested in conducting a search as soon as possible might decide to save time by listing only one or two hard-to-find items, such as the stolen rings in this case, confident that he will find in plain view all of the other evidence he is looking for before he discovers the listed items. Because rings could be located almost anywhere inside or outside a house, it is unlikely that a warrant to search for and seize the rings would restrict the scope of the search. An officer might rationally find the risk of immediately discovering the items listed in the warrant—thereby forcing him to conclude the search immediately—outweighed by the time saved in the application process.

The majority also contends that, once an officer is lawfully in a house and the scope of his search is adequately circumscribed by a warrant, "no additional Fourth Amendment

interest is furthered by requiring that the discovery of evidence be inadvertent." *Ante*, at 140. Put another way, "'the inadvertence rule will in no way reduce the number of places into which [law enforcement officers] may lawfully look.'" *Ante*, at 141 (quoting *Coolidge*, 403 U. S., at 517 (WHITE, J., concurring and dissenting)). The majority is correct, but it has asked the wrong question. It is true that the inadvertent discovery requirement furthers no privacy interests. The requirement in no way reduces the scope of a search or the number of places into which officers may look. But it does protect possessory interests. Cf. *Illinois* v. *Andreas*, 463 U. S. 765, 771 (1983) ("The plain-view doctrine is grounded on the proposition that once police are lawfully in a position to observe an item first-hand, its owner's privacy interest in that item is lost; *the owner may retain the incidents of title and possession* but not privacy") (emphasis added). The inadvertent discovery requirement is essential if we are to take seriously the Fourth Amendment's protection of possessory interests as well as privacy interests. See *supra*, at 143. The Court today eliminates a rule designed to further possessory interests on the ground that it fails to further privacy interests. I cannot countenance such constitutional legerdemain.

II

Fortunately, this decision should have only a limited impact, for the Court is not confronted today with what lower courts have described as a "pretextual" search. See, *e. g.*, *State* v. *Lair*, 95 Wash. 2d 706, 717–718, 630 P. 2d 427, 434 (1981) (en banc) (holding pretextual searches invalid). For example, if an officer enters a house pursuant to a warrant to search for evidence of one crime when he is really interested only in seizing evidence relating to another crime, for which he does not have a warrant, his search is "pretextual" and the fruits of that search should be suppressed. See, *e. g.*, *State* v. *Kelsey*, 592 S. W. 2d 509 (Mo. App. 1979) (evidence suppressed because officers, who had ample opportunity to ob-

tain warrant relating to murder investigation, entered the premises instead pursuant to a warrant relating to a drug investigation, and searched only the hiding place of the murder weapon, rather than conducting a "top to bottom" search for drugs). Similarly, an officer might use an exception to the generally applicable warrant requirement, such as "hot pursuit," as a pretext to enter a home to seize items he knows he will find in plain view. Such conduct would be a deliberate attempt to circumvent the constitutional requirement of a warrant "particularly describing the place to be searched, and the persons or things to be seized," and cannot be condoned.

The discovery of evidence in pretextual searches is not "inadvertent" and should be suppressed for that reason. But even state courts that have rejected the inadvertent discovery requirement have held that the Fourth Amendment prohibits pretextual searches. See *State* v. *Bussard*, 114 Idaho 781, 788, n. 2, 760 P. 2d 1197, 1204, n. 2 (1988); *State* v. *Kelly*, 718 P. 2d 385, 389, n. 1 (Utah 1986). The Court's opinion today does not address pretextual searches, but I have no doubt that such searches violate the Fourth Amendment.[4]

III

The Fourth Amendment demands that an individual's possessory interest in property be protected from unreasonable governmental seizures, not just by requiring a showing of probable cause, but also by requiring a neutral and detached

[4] The Court also does not dispute the unconstitutionality of a search that goes "so far astray of a search for the items mentioned in the warrant that it [becomes] a general exploratory search for any evidence of wrongdoing that might be found." *United States* v. *Tranquillo*, 330 F. Supp. 871, 876 (MD Fla. 1971). Indeed, the Court reiterates that "converting specific warrants into general warrants" is unconstitutional and emphasizes the need for scrupulous adherence to the requirements that warrants particularly describe the place to be searched and the things to be seized and that a warrantless search "be circumscribed by the exigencies which justify its initiation." *Ante*, at 139–140.

magistrate to authorize the seizure in advance. The Court today ignores the explicit language of the Fourth Amendment, which protects possessory interests in the same manner as it protects privacy interests, in order to eliminate a generally accepted element of the plain-view doctrine that has caused no apparent difficulties for law enforcement officers. I am confident, however, that when confronted with more egregious police conduct than that found in this case, *ante*, at 130–131, such as pretextual searches, the Court's interpretation of the Constitution will be less parsimonious than it is today. I respectfully dissent.

APPENDIX A

STATES THAT HAVE ADOPTED THE INADVERTENT DISCOVERY REQUIREMENT

Ala. *Taylor* v. *State*, 399 So. 2d 881, 892 (Ala. 1981)

Alaska *Deal* v. *State*, 626 P. 2d 1073, 1079 (Alaska 1980)

Ariz. *State* v. *Ault*, 150 Ariz. 459, 464, 724 P. 2d 545, 550 (1986)

Ark. *Johnson* v. *State*, 291 Ark. 260, 263, 724 S. W. 2d 160, 162 (1987)

Colo. *People* v. *Cummings*, 706 P. 2d 766, 771 (Colo. 1985)

Conn. *State* v. *Hamilton*, 214 Conn. 692, 701, 573 A. 2d 1197, 1201 (1990)

D. C. *Gant* v. *United States*, 518 A. 2d 103, 107 (DC App. 1986)

Fla. *Hurt* v. *State*, 388 So. 2d 281, 282–283 (Fla. App. 1980), review denied, 399 So. 2d 1146 (Fla. 1981)

Ga. *Mooney* v. *State*, 243 Ga. 373, 383–384, 254 S. E. 2d 337, 346, cert. denied, 444 U. S. 886 (1979)

Haw. *State* v. *Barnett*, 68 Haw. 32, 35, 703 P. 2d 680, 683 (1985)

Ill. *People* v. *Madison*, 121 Ill. 2d 195, 208, 520 N. E. 2d 374, 380–381, cert. denied, 488 U. S. 907 (1988)

Ind. *Clark* v. *State*, 498 N. E. 2d 918, 921 (Ind. 1986)

Iowa *State* v. *Emerson*, 375 N. W. 2d 256, 259 (Iowa 1985)

Kan. *State* v. *Doile*, 244 Kan. 493, 497, 769 P. 2d 666, 669 (1989)

Ky. *Patrick* v. *Commonwealth*, 535 S. W. 2d 88, 89 (Ky. 1976)

La. *State* v. *Stott*, 395 So. 2d 714, 716 (La. 1981)

Me. *State* v. *Cloutier*, 544 A. 2d 1277, 1281, n. 4 (Me. 1988)

Md. *Wiggins* v. *State*, 315 Md. 232, 251–252, 554 A. 2d 356, 365 (1989)

Mass. *Commonwealth* v. *Cefalo*, 381 Mass. 319, 330–331, 409 N. E. 2d 719, 727 (1980)

Mich. *People* v. *Dugan*, 102 Mich. App. 497, 503–505, 302 N. W. 2d 209, 211–212 (1980), cert. denied, 455 U. S. 927 (1982)

Minn. *State* v. *Buschkopf*, 373 N. W. 2d 756, 768 (Minn. 1985)

Miss. *Smith* v. *State*, 419 So. 2d 563, 571 (Miss. 1982), cert. denied, 460 U. S. 1047 (1983)

Mo. *State* v. *Clark*, 592 S. W. 2d 709, 713 (Mo. 1979), cert. denied, 449 U. S. 847 (1980)

Mont. *State* v. *Hembd*, 235 Mont. 361, 368–369, 767 P. 2d 864, 869 (1989)

Neb. *State* v. *Hansen*, 221 Neb. 103, 108–109, 375 N. W. 2d 605, 609 (1985)

Nev. *Johnson* v. *State*, 97 Nev. 621, 624, 637 P. 2d 1209, 1211 (1981)

N. H. *State* v. *Cote*, 126 N. H. 514, 525, 526, 493 A. 2d 1170, 1177–1178 (1985)

N. J. *State* v. *Bruzzese*, 94 N. J. 210, 237–238, 463 A. 2d 320, 334–335 (1983), cert. denied, 465 U. S. 1030 (1984)

N. M. *State* v. *Luna*, 93 N. M. 773, 779, 606 P. 2d 183, 188 (1980)

N. Y. *People* v. *Jackson*, 41 N. Y. 2d 146, 150–151, 359 N. E. 2d 677, 681 (1976)

N. C. *State* v. *White*, 322 N. C. 770, 773, 370 S. E. 2d 390, 392, cert. denied, 488 U. S. 958 (1988)

N. D. *State* v. *Riedinger*, 374 N. W. 2d 866, 874 (N. D. 1985)

Ohio *State* v. *Benner*, 40 Ohio St. 3d 301, 308, 533 N. E. 2d 701, 709–710 (1988), cert. denied, 494 U. S. 1090 (1990)

Okla. *Farmer* v. *State*, 759 P. 2d 1031, 1033 (Okla. Crim. App. 1988)

Ore. *State* v. *Handran*, 97 Ore. App. 546, 550–551, 777 P. 2d 981, 983, review denied, 308 Ore. 405, 781 P. 2d 855 (1989)

Pa. *Commonwealth* v. *Davidson*, 389 Pa. Super. 166, 175, 566 A. 2d 897, 901 (1989)

R. I. *State* v. *Robalewski*, 418 A. 2d 817, 824 (R. I. 1980)

S. C. *State* v. *Culbreath*, 300 S. C. 232, 237, 387 S. E. 2d 255, 257 (1990)

S. D. *State* v. *Albright*, 418 N. W. 2d 292, 295 (S. D. 1988)

Tenn. *State* v. *Byerley*, 635 S. W. 2d 511, 513 (Tenn. 1982)

Tex. *Stoker* v. *State*, 788 S. W. 2d 1, 9 (Tex. Crim. App. 1989) (en banc)

Vt. *State* v. *Dorn*, 145 Vt. 606, 620–621, 496 A. 2d 451, 459–460 (1985)

Va. *Holloman* v. *Commonwealth*, 221 Va. 947, 949, 275 S. E. 2d 620, 621–622 (1981)

Wash. *State* v. *Bell*, 108 Wash. 2d 193, 196, 737 P. 2d 254, 257 (1987)

W. Va. *State* v. *Moore*, 165 W. Va. 837, 852–853, 272 S. E. 2d 804, 813–814 (1980)

Wis. *State* v. *Washington*, 134 Wis. 2d 108, 119–121, 396 N. W. 2d 156, 161 (1986)

Wyo. *Jessee* v. *State*, 640 P. 2d 56, 63 (Wyo. 1982)

APPENDIX B

UNITED STATES COURTS OF APPEALS THAT HAVE ADOPTED THE INADVERTENT DISCOVERY REQUIREMENT

CA1: *United States* v. *Caggiano*, 899 F. 2d 99, 103 (1990)

CA2: *United States* v. *Barrios-Moriera*, 872 F. 2d 12, 16, cert. denied, 493 U. S. 953 (1989)

CA3: *United States* v. *Meyer*, 827 F. 2d 943, 945 (1987)

CA4: *Tarantino* v. *Baker*, 825 F. 2d 772, 777, n. 3 (1987)

CA5: *Crowder* v. *Sinyard*, 884 F. 2d 804, 826, n. 30 (1989), cert. pending, No. 89–1326

CA6: *United States* v. *Poulos*, 895 F. 2d 1113, 1121 (1990)

CA7: *United States* v. *Perry*, 815 F. 2d 1100, 1105 (1987)

CA8: *United States* v. *Peterson*, 867 F. 2d 1110, 1113 (1989)

CA9: *United States* v. *Holzman*, 871 F. 2d 1496, 1512 (1989)

CA10: *Wolfenbarger* v. *Williams*, 826 F. 2d 930, 935 (1987)

CA11: *United States* v. *Bent-Santana*, 774 F. 2d 1545, 1551 (1985)

CADC: *In re Search Warrant Dated July 4, 1977, for Premises at 2125 S Street, Northwest, Washington, D. C.*, 215 U. S. App. D. C. 74, 102, 667 F. 2d 117, 145 (1981), cert. denied, 456 U. S. 926 (1982)

COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL. *v.* JEAN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 89–601. Argued April 23, 1990—Decided June 4, 1990

The Equal Access to Justice Act (EAJA) directs a court to award fees and other expenses to private parties who prevail in litigation against the United States if, *inter alia*, the Government's position was not "substantially justified." 28 U. S. C. § 2412(d)(1)(A). The District Court found that respondents were prevailing parties within the meaning of the EAJA, petitioners' position was not substantially justified, and there were no other special circumstances that would make a fee award unjust. The Court of Appeals upheld these findings, but remanded for recalculation of fees. Although petitioners concede that fees for time and expenses incurred in applying for fees are appropriate, they contend that respondents are ineligible for fees for services rendered during the substantial litigation over the fees unless the Court finds that petitioners' position in the fee litigation itself was not substantially justified.

Held: A second "substantial justification" finding is not required before EAJA fees are awarded for fee litigation itself. Pp. 158–166.

(a) The EAJA's "substantial justification" requirement is a single finding that operates as a clear threshold for determining a prevailing party's fee eligibility. Once a litigant has met all of the eligibility conditions for fees, the district court has the discretion to adjust the amount of fees for various portions of the litigation, guided by reason and the statutory criteria. See *Hensley* v. *Eckerhart*, 461 U. S. 424. There is no textual support for the position that the Government may assert a "substantial justification" defense at multiple stages of an action, since the EAJA refers only to a single "position," §§ 2412(d)(1)(A) and (d)(2)(D), that the Government has taken in the past, § 2412(d)(1)(B), in "any civil action," § 2412(d)(1)(A). Pp. 158–162.

(b) Petitioners' argument that automatic awards of "fees for fees" will encourage exorbitant fee requests, generate needless litigation, and unreasonably burden the federal fisc is rejected. First, no fee award is automatic, since a district court always has discretion to fix the amount of the award once eligibility is established. In contrast, requiring courts to make a separate "substantial justification" finding regarding the Government's opposition to fee requests would multiply litigation. Second, the EAJA's purpose to eliminate the average person's financial

disincentive to challenge unreasonable governmental actions would be defeated if the Government could impose on prevailing parties the costs of litigating fee requests, costs that may exceed those incurred in litigating the claim's merits. Pp. 162–166.

863 F. 2d 759, affirmed.

STEVENS, J., delivered the opinion for a unanimous Court.

Paul J. Larkin, Jr., argued the cause for petitioners. On the briefs were *Solicitor General Starr, Assistant Attorney General Gerson, Deputy Solicitor General Merrill, Harriet S. Shapiro, William G. Kanter,* and *Michael J. Singer.*

Ira J. Kurzban argued the cause for respondents. With him on the brief were *Bruce J. Winick, Irwin P. Stotzky, Robert E. Juceam, Terrence A. Corrigan,* and *Sandra M. Lipsman.**

JUSTICE STEVENS delivered the opinion of the Court.

The Equal Access to Justice Act (EAJA) directs a court to award "fees and other expenses" to private parties who prevail in litigation against the United States if, among other conditions, the position of the United States was not "substantially justified."[1] In many cases parties are able to resolve by stipulation a claim for fees under the EAJA. In some cases, however, a fee application will prompt the Government to litigate aspects of the fee request or require the

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*Briefs of *amici curiae* urging affirmance were filed for the American Immigration Lawyers Association by *Lawrence H. Rudnick;* for the National Immigration Project et al. by *Robert L. King* and *Niels W. Frenzen;* and for the National Organization of Social Security Claimants' Representatives by *James E. Coleman, Jr., Joseph E. Killory, Jr.,* and *Nancy G. Shor.*

[1] 28 U. S. C. § 2412(d)(1)(A). The EAJA, Pub. L. 96–481, 94 Stat. 2325, and its extension and amendment, Pub. L. 99–80, 99 Stat. 183, authorized fee awards to prevailing parties in both federal agency adjudications and certain civil actions. It therefore amended relevant portions of the Administrative Procedure Act (APA), 5 U. S. C. § 504 *et seq.*, as well as the Judicial Code, 28 U. S. C. § 2412 *et seq.* This case involves only the latter portion of the EAJA.

court to convene a hearing before deciding if an award of fees and expenses is authorized. The question in this case is whether a prevailing party is ineligible for fees for the services rendered during such a proceeding unless the Government's position in the fee litigation itself is not "substantially justified."

Because the question for decision is so narrow—affecting only eligibility for compensation for services rendered for fee litigation rather than the amount that may be appropriately awarded for such services—it is not necessary to restate the protracted history of this vigorously contested litigation.[2] It is sufficient to note that the District Court expressly found that respondents "were the prevailing parties within the meaning of the Act, that the government's position was not substantially justified and that there are no other special circumstances that would make an award unjust."[3] The Court of Appeals upheld these findings. *Jean* v. *Nelson*, 863 F. 2d

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[2] The fee litigation is the subject of *Louis* v. *Nelson*, 624 F. Supp. 836 (SD Fla. 1985) (initial order), *Louis* v. *Nelson*, 646 F. Supp. 1300 (SD Fla. 1986) (corrected memorandum after hearing), and *Jean* v. *Nelson*, 863 F. 2d 759 (CA11 1988). The history of the litigation of the merits is traced in a dozen other opinions. *Louis* v. *Meissner*, 530 F. Supp. 924 (SD Fla. 1981); *Louis* v. *Meissner*, 532 F. Supp. 881 (SD Fla. 1982); *Louis* v. *Nelson*, 544 F. Supp. 973 (SD Fla. 1982); *Louis* v. *Nelson*, 544 F. Supp. 1004 (SD Fla. 1982); *Jean* v. *Nelson*, 683 F. 2d 1311 (CA11 1982); *Jean* v. *Nelson*, 711 F. 2d 1455 (CA11 1983); *Louis* v. *Nelson*, 560 F. Supp. 896 (SD Fla. 1983); *Louis* v. *Nelson*, 560 F. Supp. 899 (SD Fla. 1983); *Louis* v. *Nelson*, 570 F. Supp. 1364 (SD Fla. 1983); *Jean* v. *Nelson*, 727 F. 2d 957 (CA11 1984) (en banc); *Jean* v. *Nelson*, 472 U. S. 846 (1985); *Jean* v. *Nelson*, 854 F. 2d 405 (CA11 1988).

[3] 624 F. Supp., at 837. With respect to the lack of substantial justification, the court explained: "In light of prior precedent and the advice of counsel, [the Immigration and Naturalization Service's] refusal to comply with the APA was not reasonable; nor was the position of the United States Attorney's Office in defending these actions by claiming that the change in policy was not a rule subject to the rulemaking requirements of the APA." *Id.*, at 839.

759, 765–769 (CA11 1988). After an extensive review of the record developed at the fee hearing, however, the Court of Appeals decided that certain errors required that the case "be remanded for recalculation of attorney's fees and expenses." *Id.*, at 780. In view of this holding, we must assume that at least some of the positions petitioners took regarding the proper fee were substantially justified, even though their position on the merits of the litigation was not. Thus, the record squarely presents the question whether the District Court must make a second finding of no "substantial justification" before awarding respondents any fees for the fee litigation.

Petitioners concede that fees for time and expenses incurred in applying for fees are appropriate, but take the position that, unless the court finds that their position in the fee litigation itself was not substantially justified, fees for any litigation about fees are not recoverable.[4] It is respondents' position that fee litigation is a component part of an integrated case and that if the statutory prerequisites for an award of fees for prevailing in the case are satisfied, the award presumptively encompasses services for fee litigation. Because the Courts of Appeals have resolved this question differently, we granted certiorari. 493 U. S. 1055 (1990).[5]

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[4] Petitioners divide the consideration of EAJA fee awards into two stages:

"In our view, it is appropriate to include reasonable fees and expenses incurred in preparing a fee *application* as part of any award of fees for the merits phase of the litigation. But . . . the government should not be required to pay for attorney's fees and expenses incurred in separate *litigation* over the availability and size of the fee award unless the position of the government in this distinct phase of the case was not substantially justified." Brief for Petitioners 15–16 (footnote omitted).

[5] Compare *Cinciarelli* v. *Reagan*, 234 U. S. App. D. C. 315, 729 F. 2d 801 (1984); *McDonald* v. *Secretary of Health and Human Services*, 884 F. 2d 1468 (CA1 1989); *Trichilo* v. *Secretary of Health and Human Services*, 823 F. 2d 702 (CA2 1987); *Powell* v. *Commissioner*, 891 F. 2d 1167 (CA5

I

Section 2412(d)(1)(A) of Title 28 provides:

> "Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."

Thus, eligibility for a fee award in any civil action requires: (1) that the claimant be a "prevailing party"; (2) that the Government's position was not "substantially justified"; (3) that no "special circumstances make an award unjust"; and, (4) pursuant to 28 U. S. C. § 2412(d)(1)(B), that any fee application be submitted to the court within 30 days of final judgment in the action and be supported by an itemized statement. Only the application of the "substantially justified" condition is at issue in this case.[6]

The most telling answer to petitioners' submission that they may assert a "substantial justification" defense at multiple

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1990) (no additional finding of substantial justification required), with *Continental Web Press, Inc.* v. *NLRB*, 767 F. 2d 321 (CA7 1985); *Cornella* v. *Schweiker*, 741 F. 2d 170 (CA8 1984); *National Wildlife Federation* v. *FERC*, 870 F. 2d 542 (CA9 1989) (additional finding required).

[6] We have held that the term "substantially justified" means "'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person. That is no different from the 'reasonable basis both in law and fact' formulation adopted by the Ninth Circuit and the vast majority of other Courts of Appeals that have addressed this issue. To be 'substantially justified' means, of course, more than merely undeserving of sanctions for frivolousness." *Pierce* v. *Underwood*, 487 U. S. 552, 565–566 (1988) (citations omitted).

stages of an action is the complete absence of any textual support for this position. Subsection (d)(1)(A) refers to an award of fees "in any civil action" without any reference to separate parts of the litigation, such as discovery requests, fees, or appeals. The reference to "the position of the United States" in the singular also suggests that the court need make only one finding about the justification of that position.

In 1985, Congress amended the EAJA, adding the following definition:

> "(D) 'position of the United States' means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings." Pub. L. 99–80, 99 Stat. 185, § 2(c)(2)(B), 28 U. S. C. § 2412(d)(2)(D).

The fact that the "position" is again denominated in the singular, although it may encompass both the agency's prelitigation conduct and the Department of Justice's subsequent litigation positions, buttresses the conclusion that only one threshold determination for the entire civil action is to be made.[7]

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[7] Congress' emphasis on the underlying Government action supports a single evaluation of past conduct. See H. R. Rep. No. 98–992, pp. 9, 13 (1984) ("[T]he amendment will make clear that the Congressional intent is to provide for attorney fees when an unjustifiable agency action forces litigation, and the agency then tries to avoid such liability by reasonable behavior during the litigation"); S. Rep. No. 98–586, p. 10 (1984) ("Congress expressly recognized 'that the expense of correcting error on the part of the Government should not rest wholly on the party whose willingness to litigate or adjudicate has helped to define the limits of Federal authority.' [H. R. Rep. No. 96–1418, p. 10 (1980).] The 'Government error' referred to is not one of the Department of Justice's representatives litigating the case, but is rather the government action that led the private party to the decision to litigate").

The language Congress chose in describing the fee application procedure in § 2412(d)(1)(B) corroborates the statute's other references to a single finding. A fee application must contain an allegation "that the position of the United States was not substantially justified." *Ibid.* Again, the reference is to only one position, and it is to a position that the Government took in the past. There is no reference to the position the Government may take in response to the fee application. Moreover, the 1985 amendment to § 2412(d)(1)(B) directs a court to determine whether the Government's past position was substantially justified "on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought." Pub. L. 99–80, 99 Stat. 184–185, § 2(b), 28 U. S. C. § 2412(d)(1)(B). The reference to "the record" in the civil action is again in the singular.[8]

The single finding that the Government's position lacks substantial justification, like the determination that a claimant is a "prevailing party," thus operates as a one-time threshold for fee eligibility. In EAJA cases, the court first must determine if the applicant is a "prevailing party" by evaluating the degree of success obtained. If the Government then asserts an exception for substantial justification or for circumstances that render an award unjust, the court must make a second finding regarding these additional threshold conditions. As we held in *Hensley* v. *Eckerhart*, 461 U. S. 424 (1983), the "prevailing party" requirement is "a generous formulation that brings the plaintiff only across the

[8] The House Report on the amendment echoes this finality:

"When the case is litigated to a final decision by a court or adjudicative officer (or even when the case is settled after only some litigation procedures) the evaluation of the government's position will be straightforward, since the parties will have already aired the facts that led the agency to bring the action. *No additional discovery of the government's position will be necessary, for EAJA petition purposes.*" H. R. Rep. No. 99–120, p. 13 (1985) (emphasis added).

statutory threshold. It remains for the district court to determine what fee is 'reasonable.'" *Id.*, at 433. Similarly, once a private litigant has met the multiple conditions for eligibility for EAJA fees, the district court's task of determining what fee is reasonable is essentially the same as that described in *Hensley*. See *id.*, at 433–437.

In *Hensley*, we emphasized that it is appropriate to allow the district court discretion to determine the amount of a fee award, given its "superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Id.*, at 437. The EAJA prescribes a similar flexibility. Section § 2412(d)(1)(C) empowers the district court, "in its discretion," to "reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy." This exception to a fee award was repeated in the 1985 amendment that added a definition of "position of the United States," by there excluding fees and expenses "for any portion of the litigation in which the party has unreasonably protracted the proceedings." *Supra*, at 159; § 2412(d)(2)(D). Thus, absent unreasonably dilatory conduct by the prevailing party in "any portion" of the litigation, which would justify denying fees for that portion, a fee award presumptively encompasses all aspects of the civil action.[9]

Any given civil action can have numerous phases. While the parties' postures on individual matters may be more or less justified, the EAJA—like other fee-shifting statutes—fa-

[9] A cursory review of EAJA fee awards in 1989 (prior to appellate review) reveals that district courts substantially reduced the amounts of fees requested by parties. Out of 502 applications in 1989, the 413 that were granted requested a total of $2,419,123 in fees and expenses, of which only $1,850,906 were awarded. Annual Report of the Director of the Administrative Office of the U. S. Courts, Report of Fees and Expenses Awarded Under the Equal Access to Justice Act 99, Table 32 (1989) (hereinafter 1989 Report of Fees).

vors treating a case as an inclusive whole, rather than as atomized line-items. See, *e. g.*, *Sullivan* v. *Hudson*, 490 U. S. 877, 888 (1989) (where administrative proceedings are "necessary to the attainment of the results Congress sought to promote by providing for fees, they should be considered part and parcel of the action for which fees may be awarded"). Cf. *Gagne* v. *Maher*, 594 F. 2d 336, 344 (CA2 1979) ("[D]enying attorneys' fees for time spent in obtaining them would 'dilute the value of a fees award by forcing attorneys into extensive, uncompensated litigation in order to gain any fees'" under 42 U. S. C. § 1988), aff'd on other grounds, 448 U. S. 122 (1980); *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U. S. 546, 559 (1986) (fees for postjudgment proceedings to enforce consent decree properly compensable as a cost litigation under § 304(d) of the Clean Air Act); *New York Gaslight Club, Inc.* v. *Carey*, 447 U. S. 54 (1980) (fees for administrative proceedings included under § 706(k) of Title VII of the Civil Rights Act of 1964). Petitioners acknowledge that the EAJA may provide compensation for *all* aspects of fee litigation; they only dispute the finding necessary to support such an award. They would allow, without a specific threshold determination, fees for "'the time spent preparing the EAJA fee application . . . because it is "necessary for the preparation of the party's case[,]" 28 U. S. C. § 2414(d)(2)(A),'" but they would subject a fee request for any further work in pursuing that application to an additional substantial justification defense. Brief for Petitioners 16, n. 17 (quoting *Kelly* v. *Bowen*, 862 F. 2d 1333, 1334 (CA8 1988)); see n. 4, *supra*. We find no textual or logical argument for treating so differently a party's preparation of a fee application and its ensuing efforts to support that same application.

II

Petitioners further argue, as a matter of policy, that the allowance of an automatic award of "fees for fees" will encourage exorbitant fee requests, generate needless litigation, and

unreasonably burden the federal fisc. Brief for Petitioners 26–31. The terms of the statute, as well as its structure and purpose, identify at least two responses to these arguments.

First, no award of fees is "automatic." Eligibility for fees is established upon meeting the four conditions set out by the statute, but a district court will always retain substantial discretion in fixing the amount of an EAJA award. Exorbitant, unfounded, or procedurally defective fee applications—like any other improper position that may unreasonably protract proceedings—are matters that the district court can recognize and discount.[10] Petitioners' fear that such requests will receive "automatic" approval is unfounded. In contrast, requiring courts to make a separate finding of "substantial justification" regarding the Government's opposition to fee requests would multiply litigation. "A request for attorney's fees should not result in a second major litigation." *Hensley*, 461 U. S., at 437. As petitioners admit, allowing a "substantial justification" exception to fee litigation theoretically can spawn a "Kafkaesque judicial nightmare" of infinite litigation to recover fees for the last round of litigation over fees. Brief for Petitioners 29; *Cinciarelli* v. *Reagan*, 234 U. S. App. D. C. 315, 324, 729 F. 2d 801, 810 (1984).

Second, the specific purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions. See *Sullivan* v. *Hudson*, 490 U. S., at 883.[11] The EAJA applies to a wide range of

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[10] Because *Hensley* v. *Eckerhart*, 461 U. S. 424, 437 (1983), requires the district court to consider the relationship between the amount of the fee awarded and the results obtained, fees for fee litigation should be excluded to the extent that the applicant ultimately fails to prevail in such litigation. For example, if the Government's challenge to a requested rate for paralegal time resulted in the court's recalculating and reducing the award for paralegal time from the requested amount, then the applicant should not receive fees for the time spent defending the higher rate.

[11] Congress prefaced the EAJA with this statement of its findings and purposes:

awards in which the cost of litigating fee disputes would equal or exceed the cost of litigating the merits of the claim.[12] If the Government could impose the cost of fee litigation on prevailing parties by asserting a "substantially justified" defense to fee applications, the financial deterrent that the EAJA aims to eliminate would be resurrected. The Government's general interest in protecting the federal fisc[13] is subordinate to the specific statutory goals of encouraging private parties to

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"'(a) The Congress finds that certain individuals, partnerships, corporations, and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings.

"'(b) The Congress further finds that because of the greater resources and expertise of the United States the standard for an award of fees against the United States should be different from the standard governing an award against a private litigant, in certain situations.

"'(c) It is the purpose of this title—

"'(1) to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States; and

"'(2) to insure the applicability in actions by or against the United States of the common law and statutory exceptions to the 'American rule' respecting the award of attorney fees.'" Congressional Findings and Purposes, note following 5 U. S. C. § 504.

[12] Ninety percent of EAJA fee awards are made in cases involving the Department of Health and Human Services. In 1989, these awards averaged less than $3,000 each. 1989 Report of Fees, p. 100, Table 32.

[13] EAJA awards have remained comfortably under the Congressional Budget Office's 1985 Cost Estimate of 1,000 awards annually, averaging $6,000 each, by 1990. H. Supp. Rep. No. 99–120, pt. 2, p. 3 (1985). Although this case involves an exceptionally large award (the District Court's initial fee award totaled more than $1 million, 646 F. Supp., at 1323), in 1986 the average fee award under the EAJA, prior to appellate review, was $3,821. Annual Report of the Director of the Administrative Office of the U. S. Courts, Report of Fees and Expenses Awarded Under the Equal Access to Justice Act 93, Table 31 (1986). The average of the 413 awards granted in 1989, prior to appellate review, was $4,482. 1989 Report of Fees, p. 97, Table 31.

vindicate their rights and "curbing excessive regulation and the unreasonable exercise of Government authority."[14]

The "substantial justification" requirement of the EAJA establishes a clear threshold for determining a prevailing party's eligibility for fees, one that properly focuses on the governmental misconduct giving rise to the litigation. The EAJA further provides district courts discretion to adjust the amount of fees for various portions of the litigation,

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[14] H. R. Rep. No. 96–1418, p. 12 (1980). The Committee Reports of both the House and the Senate reflect the dual concerns of access for individuals and improvement of Government policies.

"[T]he Government with its greater resources and expertise can in effect coerce compliance with its position. Where compliance is coerced, precedent may be established on the basis of an uncontested order rather than the thoughtful presentation and consideration of opposing views. In fact, there is evidence that small businesses are the target of agency action precisely because they do not have the resources to fully litigate the issue. This kind of truncated justice undermines the integrity of the decision-making process.

"The exception created by [the EAJA] focuses primarily on those individuals for whom cost may be a deterrent to vindicating their rights. The bill rests on the premise that a party who chooses to litigate an issue against the Government is not only representing his or her own vested interest but is also refining and formulating public policy. An adjudication or civil action provides a concrete, adversarial test of Government regulation and thereby insures the legitimacy and fairness of the law. An adjudication, for example, may show that the policy or factual foundation underlying an agency rule is erroneous or inaccurate, or it may provide a vehicle for developing or announcing more precise rules. . . . Where parties are serving a public purpose, it is unfair to ask them to finance through their tax dollars unreasonable Government action and also bear the costs of vindicating their rights." *Id.*, at 10.

"Providing an award of fees to a prevailing party represents one way to improve citizen access to courts and administrative proceedings. When there is an opportunity to recover costs, a party does not have to choose between acquiescing to an unreasonable Government order or prevailing to his financial detriment. . . . By allowing a decision to contest Government action to be based on the merits of the case rather than the cost of litigating, [the EAJA] helps assure that administrative decisions reflect informed deliberation." S. Rep. No. 96–253, p. 7 (1979).

guided by reason and statutory criteria. The purpose and legislative history of the statute reinforce our conclusion that Congress intended the EAJA to cover the cost of all phases of successful civil litigation addressed by the statute.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

Syllabus

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL. *v.* SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, ET AL.

CERTIORARI TO THE SUPREME COURT OF ARKANSAS

No. 88–325. Argued March 22, 1989—Reargued December 6, 1989—Decided June 4, 1990

In 1983 petitioners brought suit in an Arkansas Chancery Court, alleging that the flat tax portion of that State's Highway Use Equalization (HUE) tax discriminated against interstate commerce in violation of the Commerce Clause by imposing on out-of-state truckers greater per-mile costs than those imposed on in-state truckers, who are likely to drive many more miles on the State's highways. Petitioners sought a refund of all HUE taxes paid. In affirming the Chancery Court's ruling that the tax was constitutional, the State Supreme Court relied on this Court's decisions upholding flat taxes in *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs of Mont.* 332 U. S. 495, and *Aero Mayflower Transit Co.* v. *Georgia Public Service Comm'n*, 295 U. S. 285, and explicitly rejected petitioners' argument that *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, overruled the *Aero Mayflower* line of cases. On June 23, 1987, this Court ruled, in *American Trucking Assns., Inc.* v. *Scheiner*, 483 U. S. 266, that unapportioned flat highway use taxes penalize travel within a free trade area among the States in violation of the Commerce Clause. Subsequently, this Court vacated the Arkansas Supreme Court's judgment and remanded the case for further consideration in light of *Scheiner*. After that court denied petitioners' motion seeking, *inter alia*, an order to escrow the HUE taxes to be collected pending a final decision on the merits, JUSTICE BLACKMUN, as Circuit Justice, ordered such an escrow on August 14, 1987. The State Supreme Court then reconsidered the HUE tax in light of *Scheiner* and ruled it unconstitutional. However, the court declined to order refunds for taxes paid before the August escrow order, holding that under the test enunciated in *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 106–107, *Scheiner* should not be applied retroactively. The court nevertheless determined that the tax money paid into escrow after the August order should be refunded.

Held: The judgment is affirmed in part and reversed in part, and the case is remanded.

295 Ark. 43, 746 S. W. 2d 377, affirmed in part, reversed in part, and remanded.

JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE KENNEDY, concluded that the Arkansas Supreme Court misapplied *Chevron Oil* in certain respects and, therefore, *Scheiner* applies to some taxation of highway use pursuant to the HUE tax. Thus, the case must be remanded to that court to determine appropriate relief in light of *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco, Dept. of Business Regulation of Fla.*, *ante*, p. 18. Pp. 176–200.

(a) Whether the State Supreme Court applied *Chevron Oil* correctly is a federal question. However, it is important to distinguish that question from the distinct remedial question at issue in *McKesson*. While the relief provided by the State from a tax statute held invalid under the Commerce Clause must be in accord with federal due process principles, see *ante*, at 36–43, 51–52, federal-state comity dictates that state courts have the initial duty of determining appropriate relief. Pp. 176–179.

(b) Under *Chevron Oil*'s three-factor nonretroactivity test, *Scheiner* does not apply to taxation of highway use prior to the date it was decided, June 23, 1987, for the HUE tax year ending June 30, 1987. First, *Scheiner* clearly established a new principle of law by expressly overruling those aspects of the *Aero Mayflower* line of cases on which Arkansas relied in enacting and assessing the HUE tax. In its original decision upholding the tax, the State Supreme Court correctly followed the *Aero Mayflower* cases rather than *Complete Auto Transit*, since the latter case only questioned the *Aero Mayflower* line, and this Court cited that line with approval in a decision subsequent to *Complete Auto Transit*, *Massachusetts* v. *United States*, 435 U. S. 444, 463–464. Second, the purpose of the Commerce Clause does not dictate retroactive application of *Scheiner*, since such application would not tend to deter future free trade violations by the States. The HUE tax when enacted was entirely consistent with the *Aero Mayflower* cases, and it is not the Clause's purpose to prevent legitimate state taxation of interstate commerce. Third, applying *Scheiner* retroactively would produce substantial inequitable results. Especially in light of *McKesson*'s holding that a ruling that a tax is unconstitutional under the Commerce Clause places substantial obligations on the States to provide relief, invalidating the HUE tax has the potential for severely burdening the State's current operations and future plans. A refund, if required, could deplete the state treasury and entail potentially significant administrative costs, while retroactively increasing taxes on the favored taxpayers would also entail such administrative costs and could at some point run afoul of the Due Process Clause under *McKesson*, *ante*, at 40–41, n. 23. Where a State can easily foresee the invalidation of its tax statutes, the burden on state operations may merit little concern. See *McKesson*,

ante, at 44–46, 50. It is unjust, however, to impose this burden when the State relied on valid existing precedent in enacting and implementing its tax. Pp. 179–186.

(c) However, the conclusion that *Scheiner* applies only prospectively does not protect those HUE taxes paid to the State for the tax year beginning July 1, 1987. The State Supreme Court's refusal to order refunds for any 1987–1988 HUE taxes paid prior to JUSTICE BLACKMUN's escrow order arose from a misapprehension of the force of *Chevron Oil*. *Scheiner* applies prospectively to the flat taxing of highway use after the date of that decision, regardless of when the taxes for such use were actually collected. Holding otherwise would result in similarly situated taxpayers receiving different remedies depending solely and fortuitously on the date they paid the tax. Pp. 186–188.

(d) The dissent's criticisms of this decision lack merit. First, the claim that this decision is unjust because it treats the taxpayers in this case differently from those in *Scheiner* is unpersuasive, since this case resolves a retroactivity question not considered in *Scheiner*, which was concerned only with a state court's ruling on the constitutionality of certain tax statutes and remanded for a determination of retroactivity and remedial issues. Second, the claim that this Court has consistently applied new decisions retroactively to civil cases which are pending on direct review is an inaccurate characterization, since a review of the Court's decisions shows that it has consistently applied the principles underlying the retroactivity doctrine enunciated in *Chevron Oil* rather than the approach suggested by the dissent. See, *e. g.*, *Cipriano* v. *City of Houma*, 395 U. S. 701. Third, contrary to the dissent's assertion, this Court has never equated its retroactivity principles with remedial principles, but has instead considered nonretroactivity to be a doctrine for determining when past precedent should be applied to a case before the Court. As such, it is better understood as part of the doctrine of *stare decisis*, rather than part of the law of remedies. See, *e. g.*, *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 364. Finally, the reasons for adopting a *per se* rule of retroactivity in criminal cases, see *Griffith* v. *Kentucky*, 479 U. S. 314—primarily, to provide expanded procedural protections to criminal defendants—are not applicable in the civil sphere, where nonretroactivity functions to avoid injustice or hardship to civil litigants who have justifiably relied on prior law, see, *e. g.*, *Chevron Oil*, *supra*, at 107. These distinctions compel the rejection of the dissent's invitation to abandon the nonretroactivity doctrine in the civil arena as the Court did in the criminal arena. Pp. 188–200.

JUSTICE SCALIA concluded that prospective decisionmaking by the Court cannot be reconciled with the scope of the judicial power under

Article III. Nonetheless, because this Court's so-called "negative" Commerce Clause jurisprudence has no basis in the text of the Commerce Clause, see, *e. g.*, *American Trucking Assns., Inc.* v. *Scheiner*, 483 U. S. 266, 303–306 (SCALIA, J., concurring in part and dissenting in part), and because *Scheiner* was therefore wrongly decided, the only reason to apply *Scheiner* is the doctrine of *stare decisis*. The purpose underlying that doctrine, which is to protect settled expectations, justifies holding that Arkansas violated the Constitution in imposing its HUE tax after *Scheiner* was announced, but does not justify holding that Arkansas violated the Constitution in imposing its HUE tax before *Scheiner* overruled this Court's earlier cases on which Arkansas presumably relied. To apply *Scheiner* retroactively, solely in the name of *stare decisis*, would turn the purpose of *stare decisis* against itself. Accordingly, the decision below should be affirmed with respect to the pre-*Scheiner* taxes and reversed with respect to the post-*Scheiner* taxes. Pp. 200–205.

O'CONNOR, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST, C. J., and WHITE and KENNEDY, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 200. STEVENS, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 205.

Andrew L. Frey reargued the cause for petitioners. With him on the briefs were *Kenneth S. Geller*, *Mark I. Levy*, *Andrew J. Pincus*, *Peter G. Kumpe*, *Daniel R. Barney*, *Robert Digges, Jr.*, *Laurie T. Baulig*, and *William S. Busker*.

A. Raymond Randolph reargued the cause for respondents. With him on the briefs were *Daniel I. Prywes*, *Bruce R. Stewart*, *Herschel H. Friday*, *B. S. Clark*, *Robert S. Shafer*, *Robert L. Wilson*, *A. T. Goodloe II*, and *Christopher O. Parker*.*

*Briefs of *amici curiae* urging reversal were filed for the Crow Tribe of Indians by *Daniel M. Rosenfelt;* for the Committee on State Taxation of the Council of State Chambers of Commerce by *Jean A. Walker* and *William D. Peltz;* for the National Private Truck Council, Inc., by *Richard A. Allen* and *Robert A. Hirsch;* and for the Tax Executives Institute, Inc., by *Timothy J. McCormally*.

Briefs of *amici curiae* urging affirmance were filed for the Commonwealth of Pennsylvania et al. by *Ernest D. Preate, Jr.*, Attorney General of Pennsylvania, *Bryan E. Barbin*, Deputy Attorney General, *John G. Knorr*

JUSTICE O'CONNOR announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE KENNEDY join.

In this case we decide whether our decision in *American Trucking Assns., Inc.* v. *Scheiner*, 483 U. S. 266 (1987), applies retroactively to taxation of highway use prior to the date of that decision.

I

In 1983 petitioners brought suit in the Chancery Court of Pulaski County, Arkansas, challenging the constitutionality of the newly enacted Arkansas Highway Use Equalization Tax Act (HUE), 1983 Ark. Gen. Acts, No. 685, Ark. Code Ann. §§ 27–35–204, 27–35–205 (1987) (formerly codified as Ark. Stat. Ann. §§ 75–817.2, 75–817.3 (Supp. 1985)), under the Commerce Clause of the Federal Constitution, Art. I, § 8, cl. 3. The HUE tax required trucks operating on Arkansas

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III, Chief Deputy Attorney General, and *Louis J. Rovelli*, Executive Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Douglas B. Baily* of Alaska, *Duane Woodard* of Colorado, *Linley E. Pearson* of Indiana, *J. Joseph Curran, Jr.*, of Maryland, *Hubert H. Humphrey III* of Minnesota, *Robert M. Spire* of Nebraska, *Brian McKay* of Nevada, *James E. O'Neil* of Rhode Island, and *Joseph B. Meyer* of Wyoming; and for the National Conference of State Legislatures et al. by *Benna Ruth Solomon* and *Charles Rothfeld*.

Briefs of *amici curiae* were filed for the State of California et al. by *John K. Van de Kamp*, Attorney General of California, and *Richard F. Finn*, Supervising Deputy Attorney General, *Eric J. Coffill*, *Jim Jones*, Attorney General of Idaho, *Marc Racicot*, Attorney General of Montana, *Nicholas J. Spaeth*, Attorney General of North Dakota, *Jim Mattox*, Attorney General of Texas, and *Paul Van Dam*, Attorney General of Utah; for the State of Vermont et al. by *Jeffrey L. Amestoy*, Attorney General of Vermont, and *Thomas R. Viall*, Assistant Attorney General, *Peter N. Perretti, Jr.*, Attorney General of New Jersey, and *Mary R. Hamill*, Deputy Attorney General, *Clarine Nardi Riddle*, Acting Attorney General of Connecticut, and *Jane D. Comerford*, Assistant Attorney General; and for the Transportation Cabinet of the Commonwealth of Kentucky by *Frederic Cowan*, Attorney General of Kentucky, *A. Stephen Reeder*, Special Assistant Attorney General, and *Patricia K. Foley*.

highways with a gross weight between 73,281 and 80,000 pounds to pay, alternatively, an annual flat tax of $175 or a tax of 5¢ per mile traveled in Arkansas or a trip permit fee of $8 per 100 miles. Effectively, HUE taxed only the first 3,500 miles of annual highway use by heavy trucks, that being the point at which it became advantageous to pay the flat tax of $175. Because trucks based in Arkansas were likely to travel many more miles on the State's highways than heavy trucks based out of the State, petitioners argued that HUE impermissibly discriminated against interstate commerce by imposing on out-of-state truckers greater per-mile costs than those imposed on in-state truckers. To remedy the alleged federal constitutional violation petitioners argued that Art. 16, § 13, of the Arkansas Constitution required the State to refund all HUE taxes petitioners had paid. See App. 12–13, 22–23 (filed Mar. 6, 1989).

Pending determination on the merits of their constitutional challenge, petitioners sought a preliminary injunction placing all HUE tax revenues in escrow to prevent those revenues from being deposited into the state treasury and being distributed to state agencies. The Chancery Court's denial of petitioners' motion for the preliminary injunction was affirmed on interlocutory appeal to the Arkansas Supreme Court. *American Trucking Assns., Inc.* v. *Gray*, 280 Ark. 258, 657 S. W. 2d 207 (1983). After further proceedings, the Chancery Court upheld the constitutionality of HUE, and the State Supreme Court affirmed. *American Trucking Assns., Inc.* v. *Gray*, 288 Ark. 488, 707 S. W. 2d 759 (1986). That court relied on our decisions in *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542 (1950), *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs of Mont.*, 332 U. S. 495 (1947), and *Aero Mayflower Transit Co.* v. *Georgia Public Service Comm'n*, 295 U. S. 285 (1935), to hold that the flat tax portion of HUE was neither excessive nor unreasonable and did not, therefore, violate the Commerce Clause. In so doing, the Arkansas Supreme Court explicitly rejected peti-

tioners' argument that our decision in *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274 (1977), had overruled the *Aero Mayflower* line of cases.

Petitioners appealed the Arkansas Supreme Court decision to this Court, and we held the case pending our decision in *Scheiner*, which involved a similar constitutional challenge to two flat highway use taxes enacted by the Commonwealth of Pennsylvania. In *Scheiner*, decided June 23, 1987, the Court held that unapportioned flat taxes such as those imposed by Pennsylvania penalize travel within a free trade area among the States. The Court applied the "internal consistency" test, see *Armco Inc.* v. *Hardesty*, 467 U. S. 638, 644 (1984), and concluded that "[i]f each State imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred." 483 U. S., at 284. We recognized in *Scheiner* that Arkansas, appearing as *amicus curiae* in that case, was one of a number of States that had enacted flat highway use taxes. See *id.*, at 285, n. 17; *id.*, at 300–301 (O'CONNOR, J., dissenting). Accordingly, three days after deciding *Scheiner*, we vacated the judgment of the Arkansas Supreme Court in *Gray* and remanded that case for further consideration in light of *Scheiner*. *American Trucking Assns., Inc.* v. *Gray*, 483 U. S. 1014 (1987). On motion by petitioners, who sought to expedite their efforts in the state courts to obtain injunctive relief against further enforcement of the HUE tax, and pursuant to this Court's former Rule 52.2, JUSTICE BLACKMUN shortened the time of issuance of our mandate to the Arkansas Supreme Court and ordered that the mandate issue on July 16, 1987.

Petitioners thereupon sought to enjoin further collection of the HUE tax or to order an escrow of the taxes to be collected pending reconsideration of *Gray* by the Arkansas Supreme Court. Motions seeking to accomplish this end were denied by that court, and petitioners returned here. In an opinion issued August 14, 1987, JUSTICE BLACKMUN, acting

as Circuit Justice, concluded there was a significant possibility that the Arkansas Supreme Court would find the HUE tax unconstitutional under *Scheiner* or, failing that, that this Court would note probable jurisdiction and strike down the HUE tax. *American Trucking Assns., Inc.* v. *Gray*, 483 U. S. 1306, 1309 (in chambers). He further concluded that, because "there is a substantial risk that [petitioners] will not be able to obtain a refund if the [HUE] tax ultimately is declared unconstitutional," *ibid.*, petitioners would suffer "irreparable injury absent injunctive relief." *Ibid.* JUSTICE BLACKMUN therefore ordered Arkansas to "escrow the HUE taxes to be collected, until a final decision on the merits in this case is reached." *Id.*, at 1310.

On October 9, 1987, the Arkansas Legislature met in special session, repealed the HUE tax, and replaced it with a tax requiring heavy trucks to pay 2.5¢ per mile of travel on Arkansas highways. See Ark. Code Ann. §§ 27–35–204, 27–35–205 (1987). Subsequently, in an opinion delivered on March 14, 1988, the Arkansas Supreme Court reconsidered the HUE tax in light of *Scheiner* and ruled it unconstitutional. *American Trucking Assns., Inc.* v. *Gray*, 295 Ark. 43, 746 S. W. 2d 377. The court, however, declined to order tax refunds to petitioners for all HUE taxes paid prior to JUSTICE BLACKMUN's August 14, 1987, escrow order. The Arkansas Supreme Court reasoned that petitioners would be entitled to refunds of all their HUE tax payments only if that court were to apply our *Scheiner* decision retroactively. In order to determine whether it would so treat *Scheiner*, the State Supreme Court applied the three-factor test we enunciated in *Chevron Oil Co.* v. *Huson*, 404 U. S. 97 (1971).

First, the Arkansas court ruled that *Scheiner* established a new rule of law with respect to flat highway use taxes by overruling the *Aero Mayflower* line of cases. The Arkansas court concluded that it reasonably relied on those cases in originally upholding the HUE tax against petitioners' Commerce Clause challenge. Second, the court held that pro-

spective application of *Scheiner* would effectuate the purpose of the Commerce Clause "to secure equal treatment for inter- and intrastate commerce and thus create an area of free trade among the states." 295 Ark., at 46, 746 S. W. 2d, at 379. In this regard, the Arkansas Supreme Court relied heavily on the decision of the Washington Supreme Court denying tax refunds because of its determination that our decision in *Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, 483 U. S. 232 (1987), should not be applied retroactively. See *National Can Corp.* v. *Department of Revenue*, 109 Wash. 2d 878, 888, 749 P. 2d 1286, 1291 (1988) (en banc) ("It is difficult to understand how retroactive application would encourage free trade among the states since whatever chill was imposed on interstate trade is in the past"), app. dism'd, 486 U. S. 1040 (1988). Third, the Arkansas Supreme Court held that it would be inequitable to order a total refund of HUE taxes already paid by petitioners into the state treasury. The court reasoned that because petitioners had driven their heavy trucks on Arkansas highways, a total refund would "allow them an unconscionable windfall far in excess of a fair recovery for the discrimination they may have suffered due to the tax. It would constitute unfair treatment of the Arkansas-based truckers who have paid the tax and seek no refund." 295 Ark., at 47, 746 S. W. 2d, at 379. The Arkansas court determined, however, that HUE tax money paid into escrow after JUSTICE BLACKMUN's August 14, 1987, order should be refunded to petitioners as that money, having not been placed into the state treasury, had not been spent or budgeted for future expenditure. Justice Hickman dissented, believing that petitioners were entitled to refunds from the date *Scheiner* was decided "or certainly no later than when we were asked, in July 1987, to place the funds in escrow." 295 Ark., at 47, 746 S. W. 2d, at 379. On petition for rehearing, petitioners modified their remedial request and urged the Arkansas court to refund HUE taxes paid in

excess of taxes petitioners would have paid had they been based in the State. The petition for rehearing was denied.

Petitioners thereupon sought a writ of certiorari from this Court. They presented the questions whether *Scheiner* should be applied retroactively and whether, even if the *Scheiner* decision is not retroactive, they are still entitled to refunds for taxes paid before we decided *Scheiner* for the tax year that began after the *Scheiner* decision or to refunds for taxes paid after the *Scheiner* decision but before JUSTICE BLACKMUN's escrow order. We granted the petition for certiorari, 488 U. S. 954 (1988), and consolidated the case with No. 88–192, *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco, Dept. of Business Regulation of Fla.*, which we also decide today. See *ante*, p. 18. We now affirm in part, reverse in part, and remand for further consideration.

II

When we have held state taxes unconstitutional in the past it has been our practice to abstain from deciding the remedial effects of such a holding. While the relief provided by the State must be in accord with federal constitutional requirements, see *McKesson*, *ante*, at 36–43, 51–52, we have entrusted state courts with the initial duty of determining appropriate relief. See, *e. g.*, *Scheiner*, 483 U. S., at 297–298; *Tyler Pipe*, *supra*, at 251–253; *Williams* v. *Vermont*, 472 U. S. 14, 28 (1985); *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263, 276–277 (1984); *Exxon Corp.* v. *Eagerton*, 462 U. S. 176, 196–197 (1983). Our reasons for doing so have arisen from a perception based in considerations of federal-state comity:

> "[T]his Court should not take it upon itself in this complex area of state tax structures to determine how to apply its holding:
>
> "'These refund issues, which are essentially issues of remedy for the imposition of a tax that unconstitutionally discriminated against interstate commerce, were not addressed by the state courts. Also, the federal constitu-

> tional issues involved may well be intertwined with, or their consideration obviated by, issues of state law. Also, resolution of those issues, if required at all, may necessitate more of a record than so far has been made in this case. We are reluctant, therefore, to address them in the first instance.'" *Tyler Pipe*, *supra*, at 252, quoting *Bacchus*, *supra*, at 277.

In a case such as this, where a state court has addressed the refund issues, the same comity-based perception that has dictated abstention in the first instance requires that we carefully disentangle issues of federal law from those of state law and refrain from deciding anything apart from questions of federal law directly presented to us. By these means we avoid interpreting state laws with which we are generally unfamiliar and deciding additional questions of federal law unnecessarily. Cf. *Michigan* v. *Long*, 463 U. S. 1032, 1039–1042 (1983). In the present case, it is eminently clear that the "state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law . . . ." *Id.*, at 1040. Specifically, the Arkansas Supreme Court took the view that, whatever else Arkansas law might require, petitioners could not receive tax refunds if *Scheiner* is not retroactive under the test of *Chevron Oil*.

The determination whether a constitutional decision of this Court is retroactive—that is, whether the decision applies to conduct or events that occurred before the date of the decision—is a matter of federal law. When questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions. See *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 364 (1932) ("We think the federal constitution has no voice upon the subject [of whether a state court may decline to give its decisions retroactive effect]"). The retroactive applicability of a constitutional decision of this Court, however, "is every bit as much of a federal question as what particular federal constitutional provisions themselves mean,

what they guarantee, and whether they have been denied." *Chapman* v. *California*, 386 U. S. 18, 21 (1967). In order to ensure the uniform application of decisions construing constitutional requirements and to prevent States from denying or curtailing federally protected rights, we have consistently required that state courts adhere to our retroactivity decisions. See, *e. g.*, *Michigan* v. *Payne*, 412 U. S. 47 (1973) (holding that the state court erred in applying *North Carolina* v. *Pearce*, 395 U. S. 711 (1969), retroactively to invalidate a resentencing proceeding occurring prior to the date of the decision in *Pearce*); *Arsenault* v. *Massachusetts*, 393 U. S. 5 (1968) (holding that the state court erred in determining that *White* v. *Maryland*, 373 U. S. 59 (1963), requiring an accused to be represented by counsel during a preliminary hearing, did not apply retroactively to petitioner).

Although the Court has recently determined that new rules of criminal procedure must be applied retroactively to all cases pending on direct review or not yet final, see *Griffith* v. *Kentucky*, 479 U. S. 314, 328 (1987), retroactivity of decisions in the civil context "continues to be governed by the standard announced in *[Chevron Oil]*," *id.*, at 322, n. 8; see also *United States* v. *Johnson*, 457 U. S. 537, 550, n. 12 (1982). In this case, the Arkansas Supreme Court decided that under *Chevron Oil* our decision in *Scheiner* need only apply prospectively. This decision presents a federal question: Did the Arkansas Supreme Court apply *Chevron Oil* correctly? As petitioners properly observed at oral argument, this is the only question before the Court in this case. Tr. of Oral Rearg. 7–10.

It is important to distinguish the question of retroactivity at issue in this case from the distinct remedial question at issue in *McKesson*, *ante*, p. 18: When taxpayers involuntarily pay a tax that is unconstitutional under existing precedents, to what relief are those affected taxpayers entitled as a matter of federal law? Our decision in *McKesson* indicates that federal law sets certain minimum requirements that States

must meet but may exceed in providing appropriate relief. Because we decide that, in certain respects, the Arkansas Supreme Court misapplied *Chevron Oil* and, therefore, that our decision in *Scheiner* applies to some taxation of highway use pursuant to the HUE tax, we must remand this case to the Arkansas Supreme Court to determine appropriate relief in light of *McKesson*.

A

Using the *Chevron Oil* test, we consider first the application of *Scheiner* to taxation of highway use prior to June 23, 1987, the date we decided *Scheiner*, for the HUE tax year ending June 30, 1987. That test has three parts:

> "First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, . . . we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Finally, we [must] weig[h] the inequity imposed by retroactive application, for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity." 404 U. S., at 106–107 (citations and internal quotations omitted).

We think it obvious that *Scheiner* meets the first test of nonretroactivity. Both the majority and dissent in that case recognized that the Court's decision left very little of the *Aero Mayflower* line of precedents standing. As the majority observed, "the precedents upholding flat taxes can no longer support the broad proposition . . . that every flat tax for the privilege of using a State's highways must be upheld even if it has a clearly discriminatory effect on commerce by

reason of that commerce's interstate character." 483 U. S., at 296. These precedents retain vitality only when flat taxes "are the only practicable means of collecting revenues from users," *ibid.*—a situation no more present in Arkansas than it was in Pennsylvania. See also *id.*, at 298 (O'CONNOR, J., dissenting) ("[T]he Court today directly overrules the holdings of" the *Aero Mayflower* precedents); *id.*, at 304 (SCALIA, J., dissenting). That the Court in *Scheiner* recognized that *Complete Auto Transit* "called into question the future vitality of earlier cases that had upheld facially neutral flat taxes," 483 U. S., at 295, does not alter our conclusion. As we observed last Term, "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477, 484 (1989). This is precisely what the State of Arkansas argued and what the Arkansas Supreme Court did in its original decision holding the HUE tax constitutional. Moreover, that court noted with reliance that we cited the *Aero Mayflower* cases with approval in *Massachusetts* v. *United States*, 435 U. S. 444, 463–464 (1978), one year after we decided *Complete Auto Transit*. 288 Ark., at 497, 707 S. W. 2d, at 762–763. The Arkansas Supreme Court correctly concluded that *Scheiner* established a "new principle of law" by overruling those aspects of the *Aero Mayflower* cases on which the State of Arkansas relied in enacting and assessing the HUE tax.

The conclusion that *Scheiner* established a new principle of law in the area of our dormant Commerce Clause jurisprudence does not necessarily end the inquiry. See *Florida* v. *Long*, 487 U. S. 223, 230 (1988); *Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans* v. *Norris*, 463 U. S. 1073, 1109–1110 (1983) (O'CONNOR, J., concurring). It is equally clear to us, however, that the pur-

pose of the Commerce Clause does not dictate retroactive application of *Scheiner* and that equitable considerations tilt the balance toward nonretroactive application. We observed in *Scheiner* that the Commerce Clause "'by its own force created an area of trade free from interference by the States.'" 483 U. S., at 280, quoting *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U. S. 318, 328 (1977). Petitioners argue that the retroactive application of *Scheiner* will tend to deter future free trade violations which the several States have strong parochial incentives to commit. As we have just discussed, however, the HUE tax was entirely consistent with the *Aero Mayflower* line of cases, and it is not the purpose of the Commerce Clause to prevent legitimate state taxation of interstate commerce. See *Complete Auto Transit*, 430 U. S., at 288.

Finally, under the third prong of the *Chevron Oil* test, we consider the equities of retroactive application of *Scheiner*. Our decision today in *McKesson* makes clear that once a State's tax statute is held invalid under the Commerce Clause, the State is obligated to provide relief consistent with federal due process principles. See *ante*, at 36–43. When the State comes under such a constitutional obligation, *McKesson* establishes that equitable considerations play only the most limited role in delineating the scope of that relief. *Ante*, at 44–51. Of course, we had no occasion to consider the equities of *retroactive* application of new law in *McKesson* because that case involved only the application of settled Commerce Clause precedent. See *ante*, at 31, n. 15. In light of *McKesson*'s holding that a ruling that a tax is unconstitutionally discriminatory under the Commerce Clause places substantial obligations on the States to provide relief, the threshold determination whether a new decision should apply retroactively is a crucial one, requiring a hard look at whether retroactive application would be unjust. At this initial stage, the question is not whether equitable considerations outweigh the obligation to provide relief for a

constitutional violation, cf. *ante*, at 44–45, 50, but whether there is a constitutional violation in the first place.

A careful consideration of the equities persuades us that *Scheiner* should not apply retroactively. Unlike *McKesson*, where the State enacted a tax scheme that "was virtually identical to the Hawaii scheme invalidated in *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263 (1984)," *ante*, at 46, and thus the State could "hardly claim surprise at the Florida courts' invalidation of the scheme," *ibid.*, here the State promulgated and implemented its tax scheme in reliance on the *Aero Mayflower* precedents of this Court. In light of these precedents, legislators would have good reason to suppose that enactment of the HUE tax would not violate their oath to uphold the United States Constitution, and the State Supreme Court would have every reason to consider itself bound by those precedents to uphold the tax against a constitutional challenge. Similarly, state tax collection authorities would have been justified in relying on state enactments valid under then-current precedents of this Court, particularly where, as here, the enactments were upheld by the State's highest court.

Where a State can easily foresee the invalidation of its tax statutes, its reliance interests may merit little concern, see *McKesson*, *ante*, at 44–46, 50. By contrast, because the State cannot be expected to foresee that a decision of this Court would overturn established precedents, the inequity of unsettling actions taken in reliance on those precedents is apparent. Although at this point the burden that the retroactive application of *Scheiner* would place on Arkansas cannot be precisely determined, it is clear that the invalidation of the State's HUE tax would have potentially disruptive consequences for the State and its citizens. A refund, if required by state or federal law, could deplete the state treasury, thus threatening the State's current operations and future plans. Presumably, under *McKesson*, the State would be required to calculate and refund that portion of the tax that would be

found under *Scheiner* to discriminate against interstate commerce, with the attendant potentially significant administrative costs that would entail. As *McKesson* makes clear, the State could also attempt to provide relief by retroactively increasing taxes on the favored taxpayers to cure any violation. But this too would entail substantial administrative costs and could at some point run into independent constitutional restrictions. See *ante*, at 40, n. 23 ("[B]eyond some temporal point the retroactive imposition of a significant tax burden may be 'so harsh and oppressive as to transgress the constitutional limitation'"). Moreover, such an approach would unfairly penalize favored taxpayers for the State's failure to foresee that this Court would overrule established precedent. Although *in the future* States may be able to protect their fiscal stability by imposing procedural requirements on taxpayer actions, see *McKesson*, *ante*, at 45, 50, such prospective safeguards do not affect the inequities of retroactive application of *Scheiner*. Nor can Arkansas be faulted for continuing to rely on its statute after its highest state court upheld the constitutionality of the tax.

In sum, we conclude that applying *Scheiner* retroactively would "produce substantial inequitable results." *Chevron Oil*, 404 U. S., at 107. The invalidation of the HUE tax has the potential for severely burdening the State's operations. That burden may be largely irrelevant when a State violates constitutional norms well established under existing precedent. See *McKesson*. But we think it unjust to impose this burden when the State relied on valid, existing precedent in enacting and implementing its tax. Accordingly, we conclude that *Scheiner* does not apply to HUE taxation for highway use prior to June 23, 1987, for the HUE tax year ending June 30, 1987.[1]

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[1] JUSTICE SCALIA indicates that the inequitable effects of retroactively applying *Scheiner* are a sign that our dormant Commerce Clause doctrine is "inherently unstable" and should not be applied to "new matters coming before us," *post*, at 203–204, rather than a factor weighing in favor of

The dissent suggests that federal courts should weigh equitable considerations only in determining the scope of relief a federal court should award. This is precisely backwards. As previously discussed, *McKesson* makes plain that equitable considerations are of limited significance once a constitutional violation is found. As the dissent's analysis ultimately makes clear, see, *e. g.*, *post*, at 218–219, n. 8, 224, its suggested approach would effectively eliminate consideration of the equities entirely in a case such as this, when the judicial decision invalidating the State's taxation scheme represented a clear break from prior precedent. This is inconsistent with our nonretroactivity doctrine and would work real and inequitable hardships in many cases.

Petitioners further argue that the equities always favor applying decisions retroactively when those decisions would burden only a governmental entity. They rely on *Owen* v. *City of Independence*, 445 U. S. 622, 651 (1980), for the proposition that local governments should not be permitted to "disavow liability for the injury [they have] begotten." *Owen* is not applicable to our considerations here. That case only addressed the question whether Congress intended a municipality to have good faith immunity from actions brought under 42 U. S. C. § 1983. Our decision in *Owen* simply construed that statute through a consideration of its legislative history and the immunity traditionally accorded municipalities in 1871, when the forerunner of § 1983 was enacted. 445 U. S., at 635–650. Our delineation of the scope of liability under a statute designed to permit suit against governmental entities and officials provides little guidance for determining the fairest way to apply our own decisions. Indeed,

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nonretroactivity. As the parties do not raise, and this case does not present, any question regarding the continued vitality of our dormant Commerce Clause jurisprudence, which the Court has developed and applied for nearly a century and a half, see *Cooley* v. *Board of Wardens of Port of Philadelphia*, 12 How. 299 (1852), we decline to address that suggestion here.

the policy concerns involved are quite distinct. In *Owen*, we discerned that according municipalities a special immunity from liability for violations of constitutional rights would not best serve the goals of § 1983, even if those rights had not been clearly established when the violation occurred. Such a determination merely makes municipalities, like private individuals, responsible for anticipating developments in the law. We noted that such liability would motivate each of the city's elected officials to "consider whether his decision comports with constitutional mandates and . . . weigh the risk that a violation might result in an award of damages from the public treasury." *Id.*, at 656. This analysis does not apply when a decision clearly breaks with precedent, a type of departure which, by definition, public officials could not anticipate nor have any responsibility to anticipate. See *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S., at 485.

In determining whether a decision should be applied retroactively, this Court has consistently given great weight to the reliance interests of all parties affected by changes in the law. See, *e. g.*, *Cipriano* v. *City of Houma*, 395 U. S. 701, 706 (1969) ("Significant hardships would be imposed on cities, bondholders, and other connected with municipal utilities if our decision today were given full retroactive effect"). To the extent that retrospective application of a decision burdens a government's ability to plan or carry out its programs, the application injures all of the government's constituents. These concerns have long informed the Court's retroactivity decisions. The Court has used the technique of prospective overruling (accompanied by a stay of judgment) to avoid disabling Congress' bankruptcy scheme, see, *e. g.*, *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 88 (1982), and has refused to invalidate retrospectively the administrative actions and decisions of the Federal Election Commission, see *Buckley* v. *Valeo*, 424 U. S. 1, 142–143 (1976). The Court has also declined to provide

retrospective remedies which would substantially disrupt governmental programs and functions. See, *e. g.*, *Lemon* v. *Kurtzman*, 411 U. S. 192, 209 (1973) *(Lemon II)* ("[S]tate officials and those with whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful") (plurality opinion); see also *Reynolds* v. *Sims*, 377 U. S. 533, 585 (1964) ("[U]nder certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid"); *Allen* v. *State Bd. of Elections*, 393 U. S. 544 (1969). The retrospective invalidation of a state tax that had been lawful under then-current precedents of this Court threatens a similar disruption of governmental operations. Therefore, our refusal here to retroactively invalidate legislation that was lawful when enacted is in accord with our previous determinations of how best to give effect to new constitutional decisions.

B

Before and after the date of our *Scheiner* decision, some petitioners paid HUE taxes for the tax year beginning July 1, 1987. The Arkansas Supreme Court ruled that the State's collection of these payments was constitutional until the date of JUSTICE BLACKMUN's escrow order. It therefore declined to order refunds for any 1987–1988 HUE taxes not paid into escrow. Petitioners argue that they are entitled to refunds of these payments even if *Scheiner* is not to be applied retroactively because these HUE tax payments were made to secure the privilege of driving heavy trucks on Arkansas highways between July 1, 1987, and June 30, 1988. Petitioners argue that the question whether *Scheiner* applies to the collection of 1987–1988 HUE taxes should depend on the "occurrence of the taxed transaction or the enjoyment of the taxed

benefit, not the remittance of the tax." Brief for Petitioners 47 (filed Jan. 18, 1989). Otherwise, petitioners contend, similarly situated 1987–1988 HUE taxpayers will receive different remedies depending solely and fortuitously on the date the individual taxpayers remitted the tax. We agree.

It is, of course, a fundamental tenet of our retroactivity doctrine that the prospective application of a new principle of law begins on the date of the decision announcing the principle. See, *e. g.*, *Florida* v. *Long*, 487 U. S., at 237–238; *Norris*, 463 U. S., at 1111 (O'CONNOR, J., concurring); *Lemon II*, *supra*; *Chevron Oil*, 404 U. S., at 99; *Phoenix* v. *Kolodziejski*, 399 U. S. 204, 214 (1970). This tenet of retroactivity, however, does not define the conduct to which *Scheiner* prospectively applies: Does it apply to the flat taxing of highway use or to the *collection* of taxes for highway use after the date of that decision? We think it apparent that *Scheiner* applies to the flat taxation of highway use after the date of that decision. This is true regardless of when the taxes for such use were actually collected. If Arkansas had collected HUE-like taxes for highway use occurring *before* the required tax payment date, a prospective decision of this Court that such taxes were unconstitutional would not preclude the State from collecting, *after* the date of that decision, taxes for highway use that occurred *before* the decision was announced. The very same principle applies where, as here, the converse is true. Because we hold *Scheiner* to apply only prospectively, flat highway taxation was permissible for highway use that occurred before the date of our decision but not after. A contrary rule would give States a perverse incentive to collect taxes far in advance of the occurrence of the taxable transaction. It would also penalize States that do not immediately collect taxes, but nevertheless plan their operations on the assumption that they will ultimately collect taxes that have accrued. In this case, the taxpayer is advantaged in the sense that certain of its tax payments were made under an unconstitutional statute and

remedies may be in order; in the hypothetical converse case, the State is advantaged in the sense that it may continue to collect taxes after the date of our decision finding its tax to be prospectively unconstitutional. In both cases, as petitioners correctly note, the critical event for prospectivity is "the occurrence of the underlying transaction, and not the payment of money therefor . . . ." Brief for Petitioners 47 (filed Jan. 18, 1989). Cf. *Lemon II*, *supra*.

Thus petitioners are correct that those HUE taxes paid to the State for the 1987–1988 tax year, regardless of whether they were paid before or after we announced *Scheiner*, are not protected by the conclusion that *Scheiner* applies only prospectively. In this regard, the Arkansas Supreme Court's holding that petitioners were not entitled to refunds for the 1987–1988 HUE taxes they paid arose from a misapplication of *Chevron Oil*. From the face of the State Supreme Court's opinion we can discern no reason apart from this misapprehension of the force of *Chevron Oil* that caused it to deny petitioners' request for 1987–1988 HUE tax refunds. Accordingly, this aspect of the Arkansas Supreme Court's opinion must be reversed.

III

The dissent claims that our decision today treats the petitioners in this case less favorably than the taxpayers in *Scheiner*, *post*, at 211–212, and challenges our retroactivity doctrine as fundamentally inequitable. The dissent asserts that not only does judicial integrity require the Court to apply new decisions to all cases pending on direct review, but also that we have consistently followed this practice in civil cases raising constitutional claims. *Post*, at 212–218. The dissent further insists that *Chevron Oil* does not enunciate principles of retroactivity; rather, it is merely an exercise of our remedial powers. *Post*, at 219–224. As we explain below, these arguments miss the mark. First, as we today resolve an issue not considered in *Scheiner*, we have neither

unfairly favored the litigants in *Scheiner* nor disfavored the litigants before us now. Second, a review of our decisions shows that we have consistently applied the retroactivity doctrine enunciated in *Chevron Oil* rather than the approach suggested by the dissent. The dissent's recharacterization of our precedents disregards both the theoretical underpinnings of the *Chevron Oil* doctrine and the concerns that led the Court to develop and retain this doctrine. Third, contrary to the dissent's assertion, the Court has never equated its retroactivity principles with remedial principles. Finally, the different functions of our retroactivity doctrine in the criminal and civil spheres lead us to reject the dissent's invitation to abandon our nonretroactivity doctrine in the civil arena as we did in the criminal arena.

The dissent's claim that today's decision is unjust because it treats the taxpayers in this case differently from the taxpayers in *Scheiner*, *post*, at 211–212, is unpersuasive. The taxpayers in *Scheiner* challenged a state court's ruling on the constitutionality of certain tax statutes; the taxpayers in this case challenge a state court's ruling on the nonretroactivity of a decision of this Court. This Court has done nothing more than resolve the separate issues raised by each case.

In *Scheiner*, the Court reversed the judgment of the Supreme Court of Pennsylvania which had upheld the constitutionality of two Pennsylvania tax statutes. After we "decided the constitutional issue presented to us," 483 U. S., at 298, we then remanded the case to the Pennsylvania Supreme Court "to consider whether our ruling should be applied retroactively and to decide other remedial issues." *Id.*, at 297. We did not decide any issues of retroactivity or relief; nor did our decision guarantee the taxpayers that the state court would retroactively apply the Court's decision or provide any particular relief. On remand of *Scheiner*, the Pennsylvania Supreme Court was free to consider the issue of retroactivity just as the Arkansas state court did in this case.

As the Arkansas Supreme Court has already passed on the question whether the Arkansas tax statutes are unconstitutional, that issue is not before us. Petitioners' claim here involves the second, distinct issue of the retroactivity of *Scheiner*. In the civil arena, we have generally considered the question of retroactivity to be a separate problem, one that need not be resolved in the law-changing decision itself. See, *e. g.*, *Consolidated Foods Corp.* v. *Unger*, 456 U. S. 1002, 1003 (1982) (BLACKMUN, J., concurring) (Court properly vacated and remanded a case for consideration in light of *Kremer* v. *Chemical Construction Corp.*, 456 U. S. 461 (1982), but on remand, "respondent will be free to argue that *Kremer* should not apply retroactively"); *Simpson* v. *Union Oil Co. of Cal.*, 377 U. S. 13, 24–25 (1964) (reserving the question whether prospective-only application of the rule announced in that opinion might be warranted). Thus, we had no obligation to consider the retroactivity of *Scheiner* in that case. Today we consider and resolve that issue, which has been properly raised and presented in this case.

The dissent's claim that this Court has consistently applied new decisions retroactively to civil cases which are pending on direct review is an inaccurate characterization of our cases. In fact, it is little more than a proposal that we *sub silentio* overrule *Chevron Oil*. The theory of retroactivity identified by the dissent was formulated in Justice Harlan's concurrence in *United States* v. *Estate of Donnelly*, 397 U. S. 286, 295–297 (1970). *Post*, at 214–215. Justice Harlan urged the Court to adopt a rule that a new decision would always apply to parties in cases pending on direct review unless "the transaction is beyond challenge either because the statute of limitations has run or the rights of the parties have been fixed by litigation and have become *res judicata*." 397 U. S., at 296. Presumably, this rule of retroactivity would also constrain the lower courts. See *Griffith* v. *Kentucky*, 479 U. S., at 323 ("As a practical matter, of course, we cannot hear each case pending on direct review and apply the

new rule. But we fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final"). If the dissent's approach had prevailed in the civil arena, no retroactivity question would ever arise: A court would only have to determine whether a case was properly before it and, if so, apply current law. However, a review of our civil decisions reveals that this Court has followed a different approach in determining when to apply decisions prospectively only.

The principles underlying the Court's civil retroactivity doctrine can be distilled from both criminal and civil cases considering this issue. When the Court concludes that a law-changing decision should not be applied retroactively, its decision is usually based on its perception that such application would have a harsh and disruptive effect on those who relied on prior law. See, *e. g.*, *Chevron Oil*, 404 U. S., at 107. In order to protect such reliance interests, the Court first identifies and defines the operative conduct or events that would be affected by the new decision. Lower courts considering the applicability of the new decision to pending cases are then instructed as follows: If the operative conduct or events occurred before the law-changing decision, a court should apply the law prevailing at the time of the conduct. If the operative conduct or events occurred after the decision, so that any reliance on old precedent would be unjustified, a court should apply the new law. See generally Schaefer, The Control of "Sunbursts": Techniques of Prospective Overruling, 42 N. Y. U. L. Rev. 631 (1967) (describing this technique).

The Court expressly relied on this doctrine in a criminal case, *Jenkins* v. *Delaware*, 395 U. S. 213 (1969). As the Court observed, a number of decisions prior to *Jenkins* had declined to apply a new rule retroactively when the "point of initial reliance," that is, "the point at which law enforcement officials relied upon practices not yet proscribed," *id.*, at 218–219, n. 7, occurred prior to the date of the law-

changing decision. See, *e. g.*, *Halliday* v. *United States*, 394 U. S. 831, 831 (1969) (new rule not applicable to guilty pleas accepted before date of law-changing decision); *Desist* v. *United States*, 394 U. S. 244, 254 (1969) (new rule not applicable to electronic surveillances conducted before date of law-changing decision); *Fuller* v. *Alaska*, 393 U. S. 80 (1968) (new rule not applicable to tainted evidence introduced before date of law-changing decision). *Jenkins* concluded that "'focusing attention on the element of reliance'" in making nonretroactivity decisions was "more consistent with the fundamental justification for not applying newly enunciated constitutional principles retroactively." 395 U. S., at 219, n. 7, quoting Schaefer, *supra*, at 646.

The Court has relied on the same reasoning in the civil arena. In decisions invalidating state election provisions, the Court has focused on the conduct or events that should not be invalidated by its law-changing decisions. In *Cipriano* v. *City of Houma*, 395 U. S. 701 (1969), for example, the Court struck down Louisiana's provisions for bond-authorization elections as violative of the Equal Protection Clause. However, to avoid frustrating the expectations of parties who relied on prior law, the Court held that courts should not invalidate a State's election or bonds if the bond authorization process had been completed, *i. e.*, if the election had not been timely challenged under state law and the bonds were ready to be issued, before the date of the decision in *Cipriano*. See *id.*, at 706 ("[W]e will apply our decision in this case prospectively. That is, we will apply it only where, under state law, the time for challenging the election result has not expired, or in cases brought within the time specified by state law for challenging the election and which are not yet final. *Thus, the decision will not apply where the authorization to issue the securities is legally complete on the date of this decision*" (emphasis added)). Although the Court looked to the state limitations period to determine when the authorization process was complete, the Court did not hold that this period

should be adopted as a time bar for raising equal protection challenges to state elections in federal court. Rather, the Court only held that bonds ready for issuance prior to the date of *Cipriano* could not be invalidated under the rule established in that decision. Similarly, in *Phoenix* v. *Kolodziejski*, 399 U. S., at 213–215, the Court held that its ruling that the state election laws at issue were unconstitutional should not be applied retroactively where the bond authorization process had been completed prior to the date of the Court's decision. See *id.*, at 214 ("[O]ur decision in this case will apply only to authorizations for general obligations bonds that are not final as of June 23, 1970, the date of this decision"). See also *Hill* v. *Stone*, 421 U. S. 289, 301–302 (1975) (holding that the law-changing decision should not apply where the authorization to issue securities became final prior to the date of the decision).

The Court's practice of focusing on the operative conduct or events is implicit in our other retroactivity decisions. In *England* v. *Louisiana State Bd. of Medical Examiners*, 375 U. S. 411 (1964), the Court established a new rule that a party remitted to the state courts by a district court's abstention order could not subsequently return to the district court if he had voluntarily litigated his federal claims in state court. The Court did not apply this rule to the case pending before it, because the individuals there had relied on prior law in litigating their federal claims in state court. *Id.*, at 422. In *Allen* v. *State Bd. of Elections*, 393 U. S., at 571–572, the Court declined to set aside elections conducted pursuant to invalid election laws, as the operative event—the elections—had been valid under law preceding the decision in *Allen*. When considering the retroactive applicability of decisions newly defining statutes of limitations, the Court has focused on the action taken in reliance on the old limitation period—usually, the filing of an action. Where a litigant filed a claim that would have been timely under the prior limitation period, the Court has held that the new statute of

limitations would not bar his suit. See *Saint Francis College* v. *Al-Khazraji*, 481 U. S. 604, 608–609 (1987); *Chevron Oil*, 404 U. S., at 107–109.

As these cases indicate, the Court has not followed the dissent's approach in the civil sphere. In none of the cases discussed above did the Court indicate that the critical factor for determining the retroactive applicability of a decision was the time when principles of res judicata or a time bar precluded further litigation. Rather, the Court's retroactivity doctrine obliged courts to apply old law to litigants before them if the operative conduct or events had occurred prior to the new decision. In this case, we merely apply these well-established principles of civil retroactivity. Here, we define the operative conduct as Arkansas' flat taxation of highway use in reliance on this Court's pre-*Scheiner* cases. *Supra*, at 186–187. We then decline to apply *Scheiner* retroactively to invalidate taxation on highway use prior to the date of that decision.

In striving to recharacterize our precedents, the dissent makes the error of equating a decision not to apply a rule retroactively with the judicial choice of a remedy. *Post*, at 219–220. As the Court makes plain in *McKesson*, there is an important difference. Once a constitutional decision applies and renders a state tax invalid, due process, not equitable considerations, will generally dictate the scope of relief offered. Nor do this Court's retroactivity decisions, whether in the civil or criminal sphere, support the dissent's assertion that our retroactivity doctrine is a remedial principle. Indeed, *Lemon II*, 411 U. S. 192 (1973), specifically recognized that the Court's principles of retroactivity were helpful, but not controlling, in deciding the scope of a federal remedy:

> "Those guidelines [expressed in *Linkletter* v. *Walker*, 381 U. S. 681 (1965), for applying our retroactivity doctrine] are helpful, but the problem of *Linkletter* and its progeny is not precisely the same as that now before us. Here, we are not considering whether we will apply a new constitutional rule of criminal law in reviewing judg-

ments of conviction obtained under a prior standard; the problem of the instant case is essentially one relating to the appropriate scope of federal equitable remedies, a problem arising from enforcement of a state statute during the period before it had been declared unconstitutional. True, the temporal scope of the injunction has brought the parties back to this Court, and their dispute calls into play values not unlike those underlying *Linkletter* and its progeny. But however we state the issue, the fact remains that we are asked to reexamine the District Court's evaluation of the proper means of implementing an equitable decree." *Id.*, at 199–200 (opinion of Burger, C. J.) (citation omitted).

While application of the principles of retroactivity may have remedial effects, they are not themselves remedial principles. Any judicial decision will affect the relief available to one of the parties before the court; even an evidentiary ruling may have some remedial effect. However, rules regarding retroactivity, like decisions regarding the mechanics of procedure, are distinct from remedial decisions which govern what a court "may do *for* the plaintiff and conversely what it can do *to* the defendant." K. York, J. Bauman, & D. Rendleman, Remedies 1 (4th ed. 1985); see also D. Dobbs, Law of Remedies 3 (1973) ("The substantive questions whether the plaintiff has any right or the defendant has any duty, and if so what it is, are very different questions from the remedial questions whether this remedy or that is preferred, and what the measure of the remedy is"). A decision defining the operative conduct or events that will be adjudicated under old law does not, in itself, specify an appropriate remedy.

Especially in light of today's holding in *McKesson*, the dissent's view that the doctrine of civil retroactivity is a remedial principle would surprise the many commentators,[2] ap-

[2] See, *e. g.*, Corr, Retroactivity: A Study in Supreme Court Doctrine "As Applied," 61 N. C. L. Rev. 745 (1983); Traynor, Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility, 28 Hastings L. J.

pellate courts, see Note, Confusion in Federal Courts: Application of the *Chevron* Test in Retroactive-Prospective Decisions, 1985 U. Ill. L. Rev. 117, 128–136, and state courts that have considered *Chevron Oil* to be exactly what this Court has always understood it to be: a doctrine or set of rules for determining when past precedent should be applied to a case before the court. As such, *Chevron Oil* is better understood as part of the doctrine of *stare decisis*, rather than as part of the law of remedies. This is how nonretroactivity was first characterized by Justice Cardozo in *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358 (1932). Considering a state court's power to apply its own decisions prospectively only, Justice Cardozo asserted:

> "We have no occasion to consider whether this division in time of the effects of a decision is a sound or an unsound application of the doctrine of *stare decisis* as known to the common law. Sound or unsound, there is involved in it no denial of a right protected by the federal constitution. . . . A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions." *Id.*, at 364.

See also *United States* v. *Estate of Donnelly*, 397 U. S., at 295 (Harlan, J., concurring). In those relatively rare circumstances where established precedent is overruled, the doctrine of nonretroactivity allows a court to adhere to past precedent in a limited number of cases, in order to avoid "jolting the expectations of parties to a transaction." *Ibid.* See also JUSTICE SCALIA's opinion concurring in the judgment, *post*, at 204–205. Although JUSTICE SCALIA declines

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533 (1977); Beytagh, Ten Years of Non-Retroactivity: A Critique and a Proposal, 61 Va. L. Rev. 1557 (1975); Schaefer, The Control of "Sunbursts": Techniques of Prospective Overruling, 42 N. Y. U. L. Rev. 631 (1967).

to rely on our doctrine of nonretroactivity, his understanding of *stare decisis* leads him to conclude that a judge who disagrees with a decision overruling prior precedent must vote to uphold the validity of "action taken [in reliance on that precedent] before the overruling occurred." *Post*, at 205. As Justice Cardozo discerned, prospective overruling allows courts to respect the principle of *stare decisis* even when they are impelled to change the law in light of new understanding.

In proposing that we extend the retroactivity doctrine recently adopted in the criminal sphere to our civil cases, the dissent assumes that the Court's reasons for adopting a *per se* rule of retroactivity in *Griffith* v. *Kentucky*, 479 U. S. 314 (1987), are equally applicable in the civil context. But there are important distinctions between the retroactive application of civil and criminal decisions that make the *Griffith* rationale far less compelling in the civil sphere.

In adopting a *per se* rule of retroactivity for criminal cases, *Griffith* relied on what, in essence, was a single justification: that it was unfair to apply different rules of criminal procedure to two defendants whose cases were pending on direct review at the same time. See *id.*, at 322–323. In expounding this theory, the Court did not explain why the pendency of a defendant's case on direct review was the critical factor for determining the applicability of new decisions. It is at least arguable, as JUSTICE WHITE pointed out in dissent, that the speed at which cases proceed through the criminal justice system should not be the key factor for determining whether "otherwise identically situated defendants may be subject to different constitutional rules." *Id.*, at 331 (internal quotation marks omitted). Nor did the Court consider whether the reliance interests of law enforcement officials would make the retroactive application of new decisions inequitable, although this factor had been a key consideration in prior cases. See, *e. g.*, *Jenkins* v. *Delaware*, 395 U. S., at 220; *Stovall* v. *Denno*, 388 U. S. 293, 299–301 (1967). In focusing solely on the pendency of a case before the court

rather than on the reliance interests of either the defendant or the government, *Griffith* implicitly rejected the rationale of our prior retroactivity doctrine: that new decisions should not be applied retroactively so as to frustrate the expectations of parties who had justifiably relied on prior law.

The Court's analysis in *Griffith* must be understood in context. During the period in which much of our retroactivity doctrine evolved, most of the Court's new rules of criminal procedure had expanded the protections available to criminal defendants. See generally Beytagh, *supra*, n. 2. Therefore, whenever the Court determined that retroactive application of a new rule would be inequitable, the Court was, in effect, according the government's reliance interests more weight than the defendant's interests in receiving the benefit of the rule. See, *e. g.*, *United States* v. *United States Coin & Currency*, 401 U. S. 715, 726 (1971) (BRENNAN, J., concurring) ("[W]hen a new procedural rule has cast no substantial doubt upon the reliability of determinations of guilt in criminal cases, we have denied the rule retroactive effect where a contrary decision would 'impose a substantial burden . . . upon the . . . judicial system . . .'") (quoting *Williams* v. *United States*, 401 U. S. 646, 664 (1971)). *Griffith*'s adoption of a *per se* rule of retroactivity can thus be understood as a rejection of this approach in favor of providing expanded procedural protections to criminal defendants. Under this new theory, any defendant whose conviction had not yet become final should be given the benefit of a new decision regardless of the additional burden this might place on law enforcement authorities.

There are no analogous reasons for adopting a *per se* rule of retroactivity in the civil context. Either party before a court may benefit from the application of the *Chevron Oil* rule. New decisions are not likely to favor civil defendants over civil plaintiffs; nor is there any policy reason for protecting one class of litigants over another. Moreover, even a party who is deprived of the full retroactive benefit of a new

decision may receive some relief. In this case, for example, petitioners are benefited by the prospective invalidation of the Arkansas tax and a ruling that *Scheiner* is applicable to taxation of highway use after the date of decision in that case. The criminal defendant, on the other hand, is generally interested in only one remedy: the reversal of his conviction. The prospective invalidation of a rule relied on in securing his conviction will not assist the criminal defendant in any way. Nor does *Griffith*'s criticism that nonretroactivity gives the benefit of a new rule to a "chance beneficiary" but then "permit[s] a stream of similar cases subsequently to flow by unaffected by that new rule," 479 U. S., at 323 (citation omitted), have force in the civil context. Although the dissent echoes this criticism, *post*, at 211–212, it may fairly be aimed only at those cases in which the Court reversed the conviction of the defendant in the law-changing decision and later determined that the rule would not be applicable retroactively, see, *e. g.*, *Desist* v. *United States*, 394 U. S., at 254–255, n. 24; *Stovall* v. *Denno*, *supra*, at 300–301. The dissent has failed to cite a single civil case in which comparable inequitable treatment has occurred. In this case, for example, the Court did not provide a benefit to the litigants in *Scheiner* that was denied the petitioners here. See *supra*, at 188–190. Contrary to the dissent's assertions, *post*, at 211–212, our use of the civil retroactivity principles does not result in the unequal treatment of similarly situated litigants. As *Chevron Oil* makes clear, the purpose of the doctrine is to avoid "'injustice or hardship'" to civil litigants who have justifiably relied on prior law. 404 U. S., at 107 (quoting *Cipriano* v. *City of Houma*, 395 U. S., at 706). In light of this aim, two parties are similarly situated if both relied on the old law before the date of the law-changing decision. A litigant who has not relied on the old law is not similarly situated in a relevant way to one who has, regardless of whether both cases are pending on direct review.

As *Griffith*'s rationale is unpersuasive in the civil context, we see no reason to abandon the *Chevron Oil* test. The Con-

stitution does not prohibit the application of decisions prospectively only, see, *e. g.*, *Solem* v. *Stumes*, 465 U. S. 638, 642 (1984); *Williams* v. *United States*, *supra*, at 651 (opinion of WHITE, J.); nor has this Court ever held that nonretroactivity violates the Article III requirement that this Court adjudicate only cases or controversies. Compare *Stovall* v. *Denno*, 388 U. S., at 301, with *Linkletter* v. *Walker*, 381 U. S., at 622, n. 3, and *Desist* v. *United States*, *supra*, at 256 (Douglas, J., dissenting). The utility of our retroactivity doctrine in cushioning the sometimes inequitable and disruptive effects of law-changing decisions is clear. The "inequities" the dissent alleges are caused by the doctrine are illusory. For these reasons, we decline the dissent's invitation to abandon our longstanding precedent.

Accordingly, in all respects apart from its disposition of 1987–1988 HUE tax payments, we affirm the judgment of the Arkansas Supreme Court.[3]

We are not, however, in a position to determine precisely the nature and extent of the relief to which petitioners are entitled for their 1987–1988 HUE tax payments. That determination, as we have already observed, lies with the state courts in the first instance. We therefore reverse and remand this aspect of the case to the Arkansas Supreme Court in order to permit it to determine the appropriate relief, not inconsistent with our decision today in *McKesson*, for petitioners' payment of 1987–1988 HUE taxes whether made before or after the date of our *Scheiner* decision.

So ordered.

JUSTICE SCALIA, concurring in the judgment.

I agree with JUSTICE O'CONNOR that Arkansas should not be held to have violated the Constitution in imposing its Arkansas Highway Use Equalization Tax (HUE) before our decision in *American Trucking Assns., Inc.* v. *Scheiner*, 483

[3] As we state in *McKesson*, *ante*, at 29–31, the Court's appellate jurisdiction in a case such as this one is not barred by the Eleventh Amendment.

U. S. 266 (1987), yet should be held to have violated the Constitution in imposing that tax after *Scheiner* was announced. My reasons, however, diverge from hers in a fundamental way, which requires some explanation.

I share JUSTICE STEVENS' perception that prospective decisionmaking is incompatible with the judicial role, which is to say what the law is, not to prescribe what it shall be. The very framing of the issue that we purport to decide today—whether our decision in *Scheiner* shall "apply" retroactively—presupposes a view of our decisions as *creating* the law, as opposed to *declaring* what the law already is. Such a view is contrary to that understanding of "the judicial Power," U. S. Const., Art. III, § 1, which is not only the common and traditional one, but which is the only one that can justify courts in denying force and effect to the unconstitutional enactments of duly elected legislatures, see *Marbury* v. *Madison*, 1 Cranch 137 (1803)—the very exercise of judicial power asserted in *Scheiner*. To hold a governmental Act to be unconstitutional is not to announce that *we* forbid it, but that the *Constitution* forbids it; and when, as in this case, the constitutionality of a state statute is placed in issue, the question is not whether some decision of ours "applies" in the way that a law applies; the question is whether the Constitution, as interpreted in that decision, invalidates the statute. Since the Constitution does not change from year to year; since it does not conform to our decisions, but our decisions are supposed to conform to it; the notion that our interpretation of the Constitution in a particular decision could take prospective form does not make sense. Either enforcement of the statute at issue in *Scheiner* (which occurred before our decision there) was unconstitutional, or it was not; if it was, then so is enforcement of all identical statutes in other States, whether occurring before or after our decision; and if it was not, then *Scheiner* was wrong, and the issue of whether to "apply" that decision needs no further attention.

I dissented in *Scheiner*, and in that case and elsewhere have registered my disagreement with the so-called "negative" Commerce Clause jurisprudence of which it is but one, typically destabilizing, instance. See *Scheiner*, *supra*, at 303–306 (SCALIA, J., dissenting); *Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, 483 U. S. 232, 259–265 (1987) (SCALIA, J., concurring in part and dissenting in part). This disagreement rests on more than my view (by no means mine alone) that that jurisprudence is a "'quagmire,'" *id.*, at 259, quoting *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450, 458 (1959), that it has been "'arbitrary, conclusory, and irreconcilable with the constitutional text,'" since its inception in the last century, 483 U. S., at 260, n. 3, quoting D. Currie, The Constitution in the Supreme Court: The First Hundred Years 1789–1888, p. 234 (1985), and that it has only worsened with age. I believe that this jurisprudence takes us, self-consciously and avowedly, beyond the judicial role itself. The text from which we take our authority to act in this field provides only that "Congress shall have Power . . . To regulate Commerce . . . among the several States," U. S. Const., Art. I, §8, cl. 3. It is nothing more than a grant of power to Congress, not the courts; and that grant to Congress cannot be read as being exclusive of the States, as even a casual comparison with other provisions of Article I will reveal. See *Tyler Pipe Industries*, *supra*, at 261. The Commerce Clause, therefore, may properly be thought to prohibit state regulation of commerce only indirectly—that is, to the extent that Congress' exercise of its Commerce Clause powers pre-empts state legislation under the Supremacy Clause, Art. VI, cl. 2. When we prohibit a certain form of state regulation that does not conflict with any federal statute, we are saying, in effect, that we presume from Congress' silence that, in the exercise of its commerce-regulating function, it means to prohibit state regulation. 483 U. S., at 262–263. There is no other way to explain how state legislation that would (according to

our "negative" Commerce Clause jurisprudence) violate the Constitution can nonetheless be authorized by a federal statute if Congress "disagree[s]" with our appraisal of the appropriate role of the States in the relevant field. See *Scheiner*, *supra*, at 289, n. 23.

Presuming law from congressional silence is quite different from the normal judicial task of interpreting and applying text or determining and applying common-law tradition. The principal question to be asked, of course, is what would a reasonable federal regulator of commerce intend—which is no different from the question a legislator himself must ask. That explains, I think, why no body of our decisional law has changed as regularly as our "negative" Commerce Clause jurisprudence. Change is almost its natural state, as it is the natural state of legislation in a constantly changing national economy. That also explains why our exercise of the "negative" Commerce Clause function has ultimately cast us in the essentially legislative role of weighing the imponderable—balancing the importance of the State's interest in this or that (an importance that different citizens would assess differently) against the degree of impairment of commerce. See, *e. g.*, *CTS Corp.* v. *Dynamics Corp. of America*, 481 U. S. 69, 89–94 (1987); *Edgar* v. *MITE Corp.*, 457 U. S. 624 (1982); *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970). The "negative" Commerce Clause is inherently unpredictable—unpredictable not just because we have applied its standards poorly or inconsistently, but because it requires us and the lower courts to accommodate, like a legislature, the inevitably shifting variables of a national economy. Whatever it is that we are expounding in this area, it is not a Constitution.

Because our "negative" Commerce Clause jurisprudence is inherently unstable, it will repeatedly result in the upsetting of settled expectations. My fellow dissenters in *Scheiner* seek to avoid this consequence in the present case—or, more precisely, seek to avoid extending this consequence beyond

the unfortunate State before the Court in *Scheiner*, to all other States that had similar laws—by embracing a rule of prospective decisionmaking. There is some appeal to that approach in the "negative" Commerce Clause field: If we are making essentially legislative judgments, why not make them in legislative fashion, *i. e.*, prospectively (subject, of course, to the limitation of the case-or-controversy requirement of Article III, § 2, cl. 1, which surely requires retroactivity with respect to the parties immediately before the Court)? I decline to adopt that solution because, as I have discussed above, such a mode of action is fundamentally beyond judicial power—and although "negative" Commerce Clause decisionmaking is as well, two wrongs do not make a right.

But it does not follow that I must conclude that the pre-*Scheiner* Arkansas HUE taxes were unconstitutional. Given my disagreement with this Court's "negative" Commerce Clause jurisprudence, the only thing that could possibly lead me to such a conclusion would be *Scheiner*'s status as precedent. Although I will not apply "negative" Commerce Clause decisional theories to new matters coming before us, *stare decisis*—that is to say, a respect for the needs of stability in our legal system—would normally cause me to adhere to a decision of this Court already rendered as to the unconstitutionality of a particular type of state law. The law here is indistinguishable from that in *Scheiner*, so I would normally suppress my earlier view of the matter and acquiesce in the Court's opinion that it is unconstitutional. Something is wrong, however, if I must take that position with respect to the pre-*Scheiner* taxes at issue in the present case. Believing that Arkansas was fully entitled to impose the taxes, I would nonetheless make the fifth vote to penalize it for having done so even during the period (pre-*Scheiner*) when our opinions announced it could lawfully do so—and I would impose this injustice in the name of *stare decisis*, that is, in the interest of protecting settled expectations. That would be

absurd. Though I do not believe I have the option of suspending the principle of retroactive judicial decisionmaking, the doctrine of *stare decisis* is a flexible command. I do not think that a sensible understanding of it requires me to vote contrary to my view of the law where such a vote would not only impose upon a litigant liability I think to be wrong, *but would also upset that litigant's settled expectations* because the earlier decision for which *stare decisis* effect is claimed *(Scheiner)* overruled prior law. That would turn the doctrine of *stare decisis* against the very purpose for which it exists. I think it appropriate, in other words—indeed, I think it necessary—for a judge whose view of the law causes him to dissent from an overruling to persist in that position (at least where his vote is necessary to the disposition of the case) with respect to action taken before the overruling occurred.

Accordingly, I would affirm the decision below with respect to Arkansas' HUE taxes imposed pre-*Scheiner*, because in my view they were constitutional. I would reverse the decision below with respect to Arkansas' HUE taxes imposed post-*Scheiner* because they were unlawful by virtue of that decision. I thus concur in the judgment of the Court.

JUSTICE STEVENS, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

This case presents two issues: whether the flat tax features of the Arkansas HUE tax violate the Commerce Clause of the Federal Constitution and, if so, whether petitioners are entitled to a tax refund. The former is ordinarily a pure question of federal law, our resolution of which should be applied uniformly throughout the Nation, while the latter is a mixed question of state and federal law. The plurality today, however, inverts that analysis. With deceptive simplicity, the plurality rules that the constitutionality *vel non* of the flat tax turns on whether state officials in a particular State could have anticipated that such a tax would violate the Constitu-

tion, *ante*, at 181–182,[1] but that the availability of a refund, even if otherwise required under state law, *ante*, at 177, rests on our own determination, as a matter of federal law, whether retrospective relief would threaten a disruption of governmental operations. *Ante*, at 185–186. That analysis is wrong on both counts. Petitioners are entitled to an adjudication of the constitutionality of the Arkansas tax under our best *current* understanding of federal law regardless of the good faith of the Arkansas legislators. The question of remedy or refund, on the other hand, addressed today in *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco, Dept. of Business Regulation of Fla.*, *ante*, p. 18, should be decided, not by us, but by the state court in the first instance.[2] The plurality's contrary conclusion is supported by nothing more than a misreading of the Court's opinion in *Chevron Oil Co.* v. *Huson*, 404 U. S. 97 (1971).

I

Arkansas enacted the Highway Use Equalization Tax Act (HUE), 1983 Ark. Gen. Acts, No. 685, Ark. Code Ann. §§ 27–35–204, 27–35–205 (1987), in March 1983. The Act, which became effective on July 1, 1983, discriminated against interstate carriers by taxing them at a higher effective tax rate than carriers which operated intrastate. Vehicles of the weight class covered by the Act were required to display a certificate evidencing compliance with the tax. Operation of

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[1] JUSTICE SCALIA, by contrast, agrees that the constitutionality of a state statute must be analyzed in light of our current understanding of the Constitution. *Ante*, at 200–201.

[2] Our opinion today in *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco, Dept. of Business Regulation of Fla.*, *ante*, at 39–40, makes clear that the Federal Constitution does not *require* the State to refund the entire tax that was unconstitutionally exacted from petitioners, but only to refund the discriminatory portion or otherwise adjust the tax to render it nondiscriminatory. Petitioners do not contend here that they are entitled to any greater relief as a matter of federal law. See Brief for Petitioners 38–39.

a vehicle in violation of the Act subjected the user to criminal sanctions and to a graduated scale of fines. § 27–35–205(k). The Act contained no method for challenging tax assessments or making payment under protest.

On May 27, 1983, before the effective date of the HUE Act, but after some $1,775,000 in tax revenues had been collected,[3] petitioners filed suit in the Pulaski County Chancery Court challenging the constitutionality of the Act under state law and the Commerce Clause of the Federal Constitution, Art. 1, § 8, cl. 3. Arkansas adheres to the common-law rule that taxes voluntarily paid cannot be recovered. See *County of Searcy* v. *Stephenson*, 244 Ark. 54, 424 S. W. 2d 369 (1968); *Brunson* v. *Board of Directors of Crawford County*, 107 Ark. 24, 153 S. W. 828 (1913). Petitioners, however, invoked the Arkansas constitutional provision governing illegal exactions, Ark. Const., Art. 16, § 13, arguing that, as a matter of state law, under the State Supreme Court's recent ruling in *Little Rock* v. *Cash*, 277 Ark. 494, 644 S. W. 2d 229 (1982), cert. denied, 462 U. S. 1111 (1983), taxpayers who paid their taxes after the date of the complaint should "be deemed to have paid their taxes involuntarily." 277 Ark., at 506, 644 S. W. 2d, at 234. Their substantive constitutional claims tracked those that had been raised by truckers to a similar Pennsylvania tax enacted in 1980. See *American Trucking Assns., Inc.* v. *Bloom*, 77 Pa. Commw. 575, 466 A. 2d 755 (1983).

The Chancery Court denied petitioners' motion for a preliminary injunction, concluding that the tax was constitutional. 2 Record 764. After a trial on the merits, the court ruled in the State's favor. In an opinion delivered in April 1986, the State Supreme Court affirmed, holding that the tax was constitutional under our decisions in *Aero Mayflower Transit Co.* v. *Georgia Pub. Serv. Comm'n*, 295 U. S. 285

[3] Petitioners do not contend that they are entitled to a tax refund for these taxes which were paid voluntarily prior to the institution of this lawsuit.

(1935), and *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs of Mont.*, 332 U. S. 495 (1947). *American Trucking Assn., Inc.* v. *Gray*, 288 Ark. 488, 707 S. W. 2d 759 (1986). Simultaneously, the Pennsylvania Supreme Court reached a similar conclusion with respect to that State's statute. *American Trucking Assns., Inc.* v. *Scheiner*, 510 Pa. 430, 509 A. 2d 838 (1986).

We noted probable jurisdiction in the Pennsylvania case, see *American Trucking Assns., Inc.* v. *Scheiner*, 479 U. S. 947 (1986), and held the Arkansas case pending our decision in *Scheiner*. In June 1987, we reversed the judgment of the State Supreme Court in *Scheiner*, concluding that that court erred in upholding the constitutionality of Pennsylvania's unapportioned marker fee and axle tax. *American Trucking Assns., Inc.* v. *Scheiner*, 483 U. S. 266, 297; see also *id.*, at 298 (O'CONNOR, J., dissenting). We reasoned that the flat taxes violated the Commerce Clause because they "exert[ed] an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States.'" *Id.*, at 286–287 (quoting U. S. Const., Art. I, §8, cl. 3). We rejected the argument that considerations of *stare decisis* required adherance to a series of cases that appeared to support the flat tax. Insofar as the *Aero Mayflower* cases—the cases upon which the Arkansas Supreme Court had relied—provided authority for the judgment of the Pennsylvania Supreme Court, we held that those precedents could "no longer support the broad proposition . . . that every flat tax for the privilege of using a State's highways must be upheld even if it has a clearly discriminatory effect on commerce by reason of that commerce's interstate character." 483 U. S., at 296. We therefore remanded for consideration of various remedial issues.

Because our resolution of *Scheiner* bore on the constitutionality of the taxes challenged in this case, we remanded it to the Arkansas Supreme Court for reconsideration in light

of that opinion. *American Trucking Assns., Inc.* v. *Gray*, 483 U. S. 1014 (1987). On remand, the Arkansas Supreme Court did *not* reconsider the constitutionality of the taxes assessed prior to *Scheiner*. Rather, it held that, as a matter of federal law, our ruling in *Scheiner* was not retroactive and did not apply to taxes assessed and applied to highway use prior to the date of decision. *American Trucking Assns., Inc.* v. *Gray*, 295 Ark. 43, 746 S. W. 2d 377 (1988). Only as to the taxes assessed *after* the date of *Scheiner*, and indeed after the date of JUSTICE BLACKMUN's order, taxes which the State had continued to collect, did the State Supreme Court hold that petitioners presented a meritorious constitutional challenge. As the plurality today explains, the judgment of the Arkansas Supreme Court constituted a decision that "whatever else Arkansas law might require, petitioners could not receive tax refunds if *Scheiner* is not retroactive under the test of *Chevron Oil*." *Ante*, at 177. The HUE tax simply was not unlawful until the date of JUSTICE BLACKMUN's order. Under the State Supreme Court's theory, if the State had repealed the statute on the date *Scheiner* was decided, the State would have never violated the Constitution, and petitioners would have never obtained an adjudication that the taxes were unconstitutional.

II

In numerous civil cases, over the past several decades, we have declined to give "retroactive effect" to decisions announcing "new" rules of law. Those cases, arising from federal court and involving the application of statutes of limitations and the scope of equitable relief, have not required us to distinguish the two senses in which retroactivity may be used. A decision may be denied "*retroactive* effect" in the sense that conduct occurring prior to the date of decision is not judged under current law, or it may be denied "retroactive *effect*" in the sense that independent principles of law limit the relief that a court may provide under current law.

Since, in a case arising from federal court, both the substantive law applicable to a course of conduct and the scope of permissible relief present federal questions, it has been unnecessary to distinguish the two senses of retroactivity.

This case, which comes to us from state court, requires us for the first time to expressly distinguish between retroactivity as a choice-of-law rule and retroactivity as a remedial principle. Whereas in cases arising from federal court both the applicable law and the type of relief are subject to plenary review, in cases from state court our mandate is more limited. See *Fox Film Corp.* v. *Muller*, 296 U. S. 207, 210 (1935); *Murdock* v. *City of Memphis*, 20 Wall. 590 (1875). The decision of a state court on a substantive matter of federal law presents a pure federal question, see *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 345 (1816); a decision as to the appropriate remedy presents a mixed question of state and federal law. Although the Federal Constitution constrains the minimum remedy a State may provide, see *McKesson*, *ante*, p. 18; *Arsenault* v. *Massachusetts*, 393 U. S. 5 (1968); *Chapman* v. *California*, 386 U. S. 18, 21 (1967), and gives this Court authority to review a decision that a particular remedy is constitutionally compelled, see *Delaware* v. *Van Arsdall*, 475 U. S. 673 (1986); *Michigan* v. *Payne*, 412 U. S. 47 (1973),[4] it does not ordinarily limit the State's power to give a decision remedial effect greater than that which a federal court would provide. See, *e. g.*, *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263, 277, n. 14 (1984); *Los Angeles* v. *Lyons*, 461 U. S. 95, 113 (1983); *Chapman*, 386 U. S., at 48 (Harlan, J., dissenting); *Iowa-Des Moines National Bank* v.

[4]The plurality's assertion to the contrary notwithstanding, see *ante*, at 178, *Payne* does not stand for the expansive proposition that federal law limits the relief a State may provide, but only for the more narrow proposition that a state court's decision that a particular remedy is constitutionally required is itself a federal question. In this case, of course, petitioners complain that the state court erroneously decided that federal law prevented the court from applying its *own* retroactivity and remedial principles.

Bennett, 284 U. S. 239 (1931). The remedial effect a decision of federal constitutional law should be given is in the first instance a matter of state law. See *ante*, at 176 (citing *Scheiner*, 483 U. S., at 297–298; *Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, 483 U. S. 232, 251, 253 (1987); *Williams* v. *Vermont*, 472 U. S. 14, 28 (1985); *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S., at 276–277; *Exxon Corp.* v. *Eagerton*, 462 U. S. 176, 196–197 (1983)).

Those principles elucidate the disposition of *Scheiner* and explain why a similar result is appropriate here. In *Scheiner*, we held that a flat tax substantially similar to the Arkansas HUE tax violated the Commerce Clause. That decision resolved the only question then before us—the lawfulness of a flat tax assessed for the years 1980 to 1986. Since no federal constitutional challenge was presented to the state remedy and since the State had not had the opportunity to determine the appropriate relief under federal and state law, we reversed the state court's determination on the merits and remanded the case for it "to consider whether our ruling should be *applied* retroactively and to decide *other remedial issues*." 483 U. S., at 297 (emphasis added). Our disposition left the state court room to apply its own remedy in the first instance but not to avoid the force of our mandate and declare the taxes under challenge constitutional "in the first place." *Ante*, at 182.

A similar disposition is appropriate here. Our judgment in *Scheiner* leaves no doubt that the Arkansas HUE tax is unconstitutional. As JUSTICE BLACKMUN concluded, in ruling on petitioners' application for establishment of an escrow account, the taxes challenged by petitioners are "substantially similar" in effect "to that of the Pennsylvania unapportioned flat taxes invalidated in *Scheiner*," and work "to deter interstate commerce." *American Trucking Assns., Inc.* v. *Gray*, 483 U. S. 1306, 1308–1309 (1987). The State Supreme Court held, and the plurality today acknowledges, that the Arkansas HUE tax, like the Pennsylvania flat taxes, violates the

command of the Commerce Clause by exerting a pressure on interstate businesses to ply their trade within state boundaries.

In my opinion, the Arkansas HUE tax also violated the Constitution before our decision in *Scheiner* and petitioners are entitled to a decision to that effect. Like the taxpayers in *Scheiner* itself, petitioners timely challenged the constitutionality of the state flat tax. Petitioners would have prevailed if the Pennsylvania tax invalidated in the *Scheiner* case had never been enacted, or if that litigation had not reached our Court until after their litigation did. They should not lose simply because we decided *Scheiner* first. In *Scheiner*, we applied our understanding of the Commerce Clause retroactively, reversing the Pennsylvania Supreme Court's judgment that a similar flat highway tax was unconstitutional and remanding the case for further consideration of the remedial issues. 483 U. S., at 297–298. We should follow the same course here. The accidental timing of our decisions in two timely filed and currently pending cases should not, and has not in the past, produced such a difference in the law applicable to the respective litigants.

III

Fundamental notions of fairness and legal process dictate that the same rules should be applied to all similar cases on direct review. Considerations of finality and the justifiable expectations that have grown up surrounding a rule are ordinarily and properly given expression in our rules of res judicata and *stare decisis*. When the legal rights of parties have been finally determined, principles "'of public policy and of private peace'" dictate that the matter not be open to relitigation every time there is a change in the law. *Federated Department Stores, Inc.* v. *Moitie*, 452 U. S. 394, 401 (1981) (quoting *Hart Steel Co.* v. *Railroad Supply Co.*, 244 U. S. 294, 299 (1917)). At the same time, however, when the legal rights of the parties have not been finally deter-

mined by a court of law, "simple justice," 452 U. S., at 401, requires that a rule of law, even a "new" rule, be evenhandedly applied. As JUSTICE BLACKMUN explained in *Griffith* v. *Kentucky*, 479 U. S. 314 (1987), when we endorsed Justice Harlan's views on the subject of retroactivity:

> "In Justice Harlan's view, and now in ours, failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication. First, it is a settled principle that this Court adjudicates only 'cases' and 'controversies.' See U. S. Const., Art. III, § 2. Unlike a legislature, we do not promulgate new rules of constitutional criminal procedure on a broad basis. Rather, the nature of judicial review requires that we adjudicate specific cases, and each case usually becomes the vehicle for announcement of a new rule. But after we have decided a new rule in the case selected, the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review. Justice Harlan observed:
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> "'If we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is difficult to see why we should so adjudicate any case at all. . . . In truth, the Court's assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation.' *Mackey* v. *United States*, 401 U. S. [667,] 679 [(1971)] (opinion concurring in judgment).
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> "Second, selective application of new rules violates the principle of treating similarly situated defendants the same. See *Desist* v. *United States*, 394 U. S. [244,] 258–259 [(1969)] (Harlan, J., dissenting). As we pointed

> out in *United States* v. *Johnson*, the problem with not applying new rules to cases pending on direct review is 'the *actual inequity* that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary' of a new rule. 457 U. S. [537,] 556, n. 16 [(1982)] (emphasis in original). Although the Court had tolerated this inequity for a time by not applying new rules retroactively to cases on direct review, we noted: 'The time for toleration has come to an end.' *Ibid.*" *Id.*, at 322–323.

Griffith was a criminal case, but the force of its reasoning cannot properly be so limited. The Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently. In both, adherence to legal principle requires that we determine the rights of litigants in accordance with our best current understanding of the law. That current understanding may include judicial principles of res judicata and *stare decisis* and legislatively prescribed statutes of limitations that protect interests in reliance and repose. It may also include a law of damages that recognizes reliance interests. But once a determination has been made that a party is properly before the Court and a new decisional rule properly states the law, interests of repose should play no role in determining the substantive legal rights of parties. Justice Harlan explained the distinction between retroactivity as a choice-of-law principle and the recognition of reliance as an element of the damages determination after a new principle of law has been applied:

> "The impulse to make a new decisional rule nonretroactive rests, in civil cases at least, upon the same considerations that lie at the core of *stare decisis*, namely to avoid jolting the expectations of parties to a transaction. Yet once the decision to abandon precedent is made, I see no justification for applying principles determined to be wrong, be they constitutional or otherwise, to liti-

gants who are in or may still come to court. The critical factor in determining when a new decisional rule should be applied to a transaction consummated prior to the decision's announcement is, in my view, the point at which the transaction has acquired such a degree of finality that the rights of the parties should be considered frozen. Just as in the criminal field the crucial moment is, for most cases, the time when a conviction has become final, see my *Desist* dissent, *supra*, so in the civil area that moment should be when the transaction is beyond challenge either because the statute of limitations has run or the rights of the parties have been fixed by litigation and have become *res judicata*. Any uncertainty engendered by this approach should, I think, be deemed part of the risks of life.

. . . . .

"To the extent that equitable considerations, for example, 'reliance,' are relevant, I would take this into account in the determination of what relief is appropriate in any given case. There are, of course, circumstances when a change in the law will jeopardize an edifice which was reasonably constructed on the foundation of prevailing legal doctrine. Thus, it may be that the law of remedies would permit rescission, for example, but not an award of damages to a party who finds himself able to avoid a once-valid contract under new notions of public policy. Cf. *Simpson* v. *Union Oil Co.*, 377 U. S. 13, 25 (1964). . . . The essential point is that while there is flexibility in the law of remedies, this does not affect the underlying substantive principle that short of a bar of *res judicata* or statute of limitations, courts should apply the prevailing decisional rule to the cases before them." *United States* v. *Estate of Donnelly*, 397 U. S. 286, 295–297 (1970) (concurring opinion).

Until today, we have consistently applied these principles in civil cases where a litigant has challenged the constitution-

ality of a state or local law.[5] In *Cipriano* v. *City of Houma*, 395 U. S. 701 (1969), for example, we struck down a Louisiana law which gave only property taxpayers the right to vote in elections called to approve the issuance of revenue bonds by a municipal utility. The Louisiana legislators who enacted the provision had "good reason to suppose," *ante*, at 182, that it was constitutional when it was first adopted in 1880 and reenacted in 1910 and 1921, but a string of subsequent decisions the preceding five Terms had effected a sea change in election law no less substantial than this Court's decisions in *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274 (1977), and *Scheiner* effected with respect to the understanding of the Commerce Clause.[6] The good faith of the legislators and the reliance interests of the State, nonetheless, did not convince us that a different rule of constitutional law should be applied to the Louisiana statute than that which we understood to be the rule on the date of decision. Although "retroactive" application of our decision might

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[5] Indeed, our whole law of qualified immunity is predicated on the assumption that even "new" law decisions apply retroactively. In *Owen* v. *City of Independence*, 445 U. S. 622 (1980), for example, we held a municipality liable for violating principles of due process established, weeks after its conduct, in *Board of Regents of State Colleges* v. *Roth*, 408 U. S. 564 (1972), and rejected the municipality's claim to qualified immunity. Our decision in *Owen* is necessarily predicated upon the view that a court should apply the law in effect at the time of decision in considering whether the State has violated the Constitution. Although the plurality is technically correct that *Owen* did not hold that constitutional decisions should always apply "retroactively," *ante*, at 184–185, that case, and the Congress that enacted 42 U. S. C. § 1983, surely did not contemplate that state actors could achieve, through the judicially crafted doctrine of retroactivity, the immunity not only from damages but also from liability denied them on the floors of Congress. Cf. Rudovsky, the Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights, 138 U. Pa. L. Rev. 23, 79–80 (1989).

[6] The decisions were *Avery* v. *Midland County*, 390 U. S. 474, 486 (1968); *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663, 680 (1966); and *Reynolds* v. *Sims*, 377 U. S. 533, 589 (1964).

produce "'injustice or hardship,'" 395 U. S., at 706 (quoting *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 364 (1932)), those concerns were sufficiently protected by holding that, as a matter of federal law, the decision need not apply "where the authorization to issue the securities is legally complete on the date of this decision." 395 U. S., at 706. We ruled that the lower court which had rejected the plaintiff's timely filed challenge was in error and that our decision would apply "where, under state law, the time for challenging the election result has not expired, or in cases brought within the time specified by state law for challenging the election and which are not yet final." *Ibid.*

In *Phoenix* v. *Kolodziejski*, 399 U. S. 204 (1970), over the dissent of Justice Stewart, Justice Harlan, and Chief Justice Burger, the Court invalidated an Arizona statute limiting the franchise to real property taxpayers in elections to authorize general obligation bonds. Again, the legislators would have had little reason to believe that the provisions were unconstitutional when enacted in 1930. JUSTICE WHITE, in a portion of the opinion joined by Justice Harlan, reaffirmed the retroactivity approach of *Cipriano*. The decision would "apply only to authorizations for general obligation bonds that are not final as of . . . the date of this decision." 399 U. S., at 214. Since the plaintiff's challenge was timely filed, the case would apply "retroactively" to her. *Id.*, at 214–215. Moreover, "[i]n the case of States authorizing challenges to bond elections within a definite period, all elections held prior to the date of this decision will not be affected by this decision unless a challenge on the grounds sustained by this decision has been or is brought within the period specified by state law." *Id.*, at 214.[7] See also *Hill* v. *Stone*, 421 U. S. 289, 301–302 (1975).

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[7] The Court also stated that, as a remedial matter, in States with no well-defined period for challenging bond elections, bonds issued prior to the commencement of an action would not be open to challenge on the basis of its decision. 399 U. S., at 214. Justice Harlan, who joined this portion

Under *Cipriano* and *Kolodziejski*, petitioners are plainly entitled to an adjudication that the Arkansas HUE tax violated the Constitution both before and after our decision in *Scheiner*. Their lawsuit was timely filed and as the case comes to us the assessment of the taxes is not yet final. The evenhanded administration of justice requires that we give them the benefit of the same decisional rule that we applied in favor of the taxpayers in *Scheiner*.

IV

The plurality rejects this analysis and, by implication, our decisions in *Cipriano* and *Kolodziejski*, and instead applies the approach that we took with respect to federal statutes of limitations in *Chevron Oil Co.* v. *Huson*, 404 U. S. 97 (1971). The plurality states that, "[i]f the operative conduct or events occured before the law-changing decision, a court should apply the law prevailing at the time of the conduct," *ante*, at 191, and that "[e]ither party before a court may benefit from the application of the *Chevron Oil* rule." *Ante*, at 198. The assessment of HUE taxes was constitutional, *ante*, at 182, because at the time it was enacted the state legislators would have had good reason to believe it to be constitutional and, at the time it was collected, state authorities were justified in relying on then-current precedents of the Court. *Ante*, at 181–182.[8] Under the same logic, if the tax was con-

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of the opinion, did not understand it to express any views contrary to those which he had expressed in *United States* v. *Estate of Donnelly*, 397 U. S. 286, 295 (1970). In addition, as this case comes to us, it is conceded that petitioners' challenge was timely filed pursuant to a state provision for challenging tax payments.

[8] Although the plurality makes much of the potential liability to which the State might be subject under the Due Process Clause or state law, it admits in the end that the "initial duty of determining appropriate relief" lies with the state courts, *ante*, at 176, and that, as the case comes to us, "the burden that the retroactive application of *Scheiner* would place on Arkansas cannot be precisely determined." *Ante*, at 182. In any event, even if the State were to be held liable under the Due Process Clause or

sidered unconstitutional prior to a law-changing decision such as *James* v. *Dravo Contracting Co.*, 302 U. S. 134 (1937), or *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274 (1977), presumably the State would still be held liable even though, under our better understanding of the Constitution, its conduct was entirely lawful. If the plurality's proffered distinction of *Griffith* is to be accepted, the same retroactivity rules must apply to civil defendants as apply to civil plaintiffs. *Ante*, at 198–199.

The plurality's sole support for this anomalous approach—that the law applicable to a particular case is that law which the parties believe in good faith to be applicable to the case—is citation to a single footnote in *Griffith* that states that "the area of civil retroactivity . . . continues to be governed by the standard announced in *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 106–107 (1971)." 479 U. S., at 322, n. 8.[9] The footnote in *Griffith*, however, does not support the majority's reading.[10] Close examination of *Chevron Oil* and its progeny re-

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state law, the plurality should not absolve the State of that liability through the backdoor of determining its conduct to be lawful.

[9] Although one would not surmise it from the plurality's treatment of the issue, the applicability of *Chevron Oil* has been challenged both by the parties, see Brief for Petitioners 12; Brief for Respondents 23–24, and by *amici* on both sides of the case, see, *e. g.*, Brief for National Conference of State Legislatures et al. as *Amici Curiae* 6, 11; Brief for National Private Truck Council, Inc., as *Amicus Curiae* 6.

[10] Nor do *Chapman* v. *California*, 386 U. S. 18 (1967), *Michigan* v. *Payne*, 412 U. S. 47 (1973), and *Arsenault* v. *Massachusetts*, 393 U. S. 5 (1968), provide any support for the plurality's approach. *Chapman* involved a remedy for a constitutional violation and thus undermines, rather than supports, the plurality's analysis. What we said presented a federal question in the passage quoted incompletely by the plurality, *ante*, at 177–178, was "[w]hether a conviction for a crime should stand when a State has failed to accord federal constitutionally guaranteed rights." 386 U. S., at 21. *Arsenault* presented a similar situation. The state court, under the guise of retroactivity, denied a remedy that was constitutionally required. Finally, in *Payne*, the state court was unclear as to whether a particular remedy was required by the Federal Constitution.

veals that those cases establish a remedial principle for the exercise of equitable discretion by federal courts and not, as the plurality states, a choice-of-law principle applicable to all cases on direct review. *Ante*, at 191.

Chevron Oil involved a controversy between two private litigants over application of the statute of limitations for actions under the Outer Continental Shelf Lands Act. At the time the lawsuit was initiated there was a long line of federal-court decisions holding that the admiralty law doctrine of laches applied to personal injury suits under the Act, 404 U. S., at 107, and the defendant did not initially challenge the timeliness of the action. *Id.*, at 99. In those special circumstances, we ruled that our interpretation that the Act did not incorporate the admiralty doctrine would not apply retroactively to bar the plaintiff's suit. Remedial considerations were dispositive to our analysis. We stressed that a court considering the retroactive effect of a decision establishing a new principle of law should consider remedial issues such as the purpose and effect of the rule in question and the inequity imposed by retroactive application, *id.*, at 106–107, and held that "devotion to the underlying purpose of the Lands Act's absorption of state law and a weighing of the equities requires nonretroactive application of the state statute of limitations." *Id.*, at 109; see also *Goodman* v. *Lukens Steel Co.*, 482 U. S. 656, 662–664 (1987) (applying new limitations rule retroactively when there was no previous law on which party was entitled to rely). It would have been most inequitable to have held that the plaintiff had "'slept on his rights'" during a period in which neither he nor the defendant could have known the time limitation that applied to the case. 404 U. S., at 108.

Insofar as the Court in *Chevron Oil* did not apply its interpretation of federal law to the parties before the Court, and affirmed the lower court's decision adopting a contrary understanding of federal law, that case does not even address the problem which is presented by this case, and was ad-

dressed by Justice Harlan, of disparate treatment of similarly situated parties. It is one thing for a court to address issues that are not indispensable to its judgment or to delay the issuance of a judgment;[11] it is quite another for it to refuse to apply reasoning in one case that is necessary to its judgment in a virtually identical case.

More fundamentally, however, *Chevron Oil* involved the application of a statute of limitations, an area over which the federal courts historically have asserted equitable discretion to craft rules of tolling, laches, and waiver. See *Bowen* v. *City of New York*, 476 U. S. 467, 479 (1986); *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385, 398 (1982); *Burnett* v. *New York Central R. Co.*, 380 U. S. 424 (1965); *Braun* v. *Sauerwein*, 10 Wall. 218, 223 (1870) ("It seems, therefore, to be established, that the running of a statute of limitation may be suspended by causes not mentioned in the statute itself"). Statutes of limitations proceed upon the "presumption that claims are extinguished whenever they are not litigated in the proper forum within the prescribed period, and they take away all solid ground of complaint, because they rest on the negligence or *laches* of the party himself," *Hanger* v. *Abbott*, 6 Wall. 532, 538 (1868); when "none of the reasons on which the statute is founded can possibly apply," *id.*, at 539–540, the federal courts have exercised equitable discretion to suspend the running of a limitations period in conformity with the "policy underlying [the] statute of limitations," *Burnett*, *supra*, at 434. The author of *Chevron Oil* later explained: "[T]he mere fact that a federal statute providing for substan-

[11] In that respect, *Chevron Oil Co.* v. *Huson*, 404 U. S. 97 (1971), is one in a line of cases in which the Court has announced new rules for the future only, refusing to apply them even to the parties before the Court. See also *Buckley* v. *Valeo*, 424 U. S. 1, 142–143 (1976); *England* v. *Louisiana State Bd. of Medical Examiners*, 375 U. S. 411, 422 (1964). In *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 88 (1982), the Court held that its decision should not be applied retroactively, but only in the sense that *judgments* entered prior to the date of decision would not be upset.

tive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose." *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538, 559 (1974) (Stewart, J.). When the federal courts have no equitable discretion, we have held a federal court has no authority to refuse to apply a law retroactively. See *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U. S. 368, 379 (1981).

The remainder of our "retroactivity" cases fit into a similar mold. In *Saint Francis College* v. *Al-Khazraji*, 481 U. S. 604 (1987), we once again recognized that "[t]he usual rule is that federal cases should be decided in accordance with the law existing at the time of decision," *id.*, at 608 (citing *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U. S. 473, 486, n. 16 (1981); *Thorpe* v. *Housing Authority of Durham*, 393 U. S. 268, 281 (1969); *United States* v. *Schooner Peggy*, 1 Cranch 103, 110 (1801)), but found that *Chevron Oil* "counsel[ed] against retroactive application *of statute of limitations decisions* in certain circumstances." 481 U. S., at 608 (emphasis added). Without deciding the correct statute of limitations period ourselves, we held that the respondent's claim was not time barred because it was timely filed under clearly established law in the Circuit. By contrast, in *Goodman* v. *Lukens Steel Co.*, 482 U. S. 656 (1987), we gave retroactive effect to our decision on the statute of limitations for suits under 42 U. S. C. §1981—which overruled clearly established law in the Circuit—because at the time the complaining party brought suit there was no clear Circuit precedent on which it was entitled to rely. 482 U. S., at 662–663. *Saint Francis College* and *Lukens Steel Co.* make clear that *Chevron Oil* does not alter the principle that consummated transactions are analyzed under the best current understanding of the law at the time of decision, but rather establishes a principle particular to the exercise of equitable discretion.

The civil cases upon which *Chevron Oil* relied, *Allen* v. *State Bd. of Elections*, 393 U. S. 544 (1969), *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481 (1968), *Reynolds* v. *Sims*, 377 U. S. 533, 585 (1964), and *Simpson* v. *Union Oil Co. of Cal.*, 377 U. S. 13 (1964), as well as those cases which have relied upon it, *Florida* v. *Long*, 487 U. S. 223 (1988), *Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans* v. *Norris*, 463 U. S. 1073 (1983), and *Lemon* v. *Kurtzman*, 411 U. S. 192 (1973) *(Lemon II)*, have concerned not the application of a new constitutional or statutory rule, *id.*, at 199, but rather the relief that a *federal* court should award when applying the new law.[12] See also *Caban* v. *Mohammed*, 441 U. S. 380, 416 (1979) (STEVENS, J., dissenting). These cases are all remedy cases in which, as Justice Harlan explained, consideration of reliance might be appropriate. See *United*

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[12] *Chevron Oil* also relied upon the criminal cases that were overruled in *Griffith* v. *Kentucky*, 479 U. S. 314 (1987). The other civil cases relied on by the Court in *Chevron Oil—Cipriano* v. *City of Houma*, 395 U. S. 701 (1969), *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371 (1940), *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358 (1932), and the municipal bond cases, *Gelpcke* v. *City of Dubuque*, 1 Wall. 175 (1864); *Havemeyer* v. *Iowa County*, 3 Wall. 294 (1866); and *Railroad Co.* v. *McClure*, 10 Wall. 511 (1871), provide no support for the judgment here. On *Cipriano*, see *supra*, at 215–217. As to the other civil cases cited by *Chevron Oil*, Justice Harlan has explained why none of them support the result reached by the Court today:

"*Gelpcke* v. *City of Dubuque*, 1 Wall. 175 (1864), holds only that *state* courts may be *compelled* in some situations by particular provisions of *the Federal Constitution* to apply certain new rules prospectively only. . . . *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358 (1932), merely holds that the Federal Constitution imposes no barrier to a state court's decision to apply a new state common-law rule prospectively only. Is it not sufficient answer to the dissenters' final assertion of precedential support to point out that *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371 (1940), was a collateral attack on a civil judgment already otherwise final and entitled to *res judicata* effect?" *Mackey* v. *United States*, 401 U. S. 667, 698 (1971) (opinion concurring in judgment in part and dissenting in part).

States v. *Estate of Donnelly*, 397 U. S., at 296–297 (concurring opinion). As the plurality stated in *Lemon II*, the problem of "the appropriate scope of *federal* equitable remedies" is distinct from the choice-of-law issue implicated by this case. 411 U. S., at 199 (emphasis added). "In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding that those interests have constitutional roots." *Id.*, at 201; see also *id.*, at 199–200 (citing *Estate of Donnelly*, 397 U. S., at 296–297 (Harlan, J., concurring)).

The Arkansas HUE tax unquestionably violates the Commerce Clause. Two results might follow from that conclusion. If the retention of taxes assessed violates the Due Process Clause under our decision today in *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco, Dept. of Business Regulation of Fla.*, *ante*, at 36–43, petitioners are entitled to a remedy. The State's freedom to impose various procedural requirements on the refund mechanism sufficiently meets any state interest in sound fiscal planning. *Ante*, at 44–45. If the retention of the taxes does not violate the Due Process Clause, but does violate the state constitutional provision governing illegal exactions, petitioners are entitled to relief as a matter of state law. The State has the right to provide relief for illegally exacted taxes and make its own judgment as to the equities free from this Court's determination that such relief would be unduly burdensome. In either event—whether we think relief from a violation of fundamental fairness to be unfair or the State's choice of remedy unjust to the State—we have no warrant to substitute our judgment for what the Due Process Clause or state law would require.

V

I would hold that our decision in *Scheiner* need apply only where, under state law, the time for challenging the tax has not expired, or in cases brought within the time specified by

state law for challenging the tax, the decisions are not yet final. The Arkansas Supreme Court did not reach the issue whether a refund remedy was available under state law because of its erroneous view that federal law prevented retroactive application of our decision in *Scheiner* to taxes paid prior to the date of JUSTICE BLACKMUN's escrow order. I would therefore remand the case to the Arkansas Supreme Court for consideration whether petitioners are entitled to relief under state law or under our decision today in *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco, Dept. of Business Regulation of Fla.*, *ante*, p. 18.

I respectfully dissent.

BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS (DIST. 66) ET AL. *v.* MERGENS, BY AND THROUGH HER NEXT FRIEND, MERGENS, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 88–1597. Argued January 9, 1990—Decided June 4, 1990

Westside High School, a public secondary school that receives federal financial assistance, permits its students to join, on a voluntary basis, a number of recognized groups and clubs, all of which meet after school hours on school premises. Citing the Establishment Clause and a School Board policy requiring clubs to have faculty sponsorship, petitioner school officials denied the request of respondent Mergens for permission to form a Christian club that would have the same privileges and meet on the same terms and conditions as other Westside student groups, except that it would have no faculty sponsor. After the Board voted to uphold the denial, respondents, current and former Westside students, brought suit seeking declaratory and injunctive relief. They alleged, *inter alia*, that the refusal to permit the proposed club to meet at Westside violated the Equal Access Act, which prohibits public secondary schools that receive federal assistance and that maintain a "limited open forum" from denying "equal access" to students who wish to meet within the forum on the basis of the "religious, political, philosophical, or other content" of the speech at such meetings. In reversing the District Court's entry of judgment for petitioners, the Court of Appeals held that the Act applied to forbid discrimination against respondents' proposed club on the basis of its religious content, and that the Act did not violate the Establishment Clause.

Held: The judgment is affirmed.

867 F. 2d 1076, affirmed.

JUSTICE O'CONNOR delivered the opinion of the Court with respect to Parts I, II–A, II–B, and II–C, concluding that petitioners violated the Equal Access Act by denying official recognition to respondents' proposed club. Pp. 234–247.

(a) The Act provides, among other things, that a "limited open forum" exists whenever a covered school "grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises." Its equal access obligation is therefore triggered even if

such a school allows only one "noncurriculum related" group to meet. Pp. 234–237.

(b) Although the Act does not define the crucial phrase "noncurriculum related student group," that term is best interpreted in the light of the Act's language, logic, and nondiscriminatory purpose, and Congress' intent to provide a low threshold for triggering the Act's requirements, to mean any student group that does not *directly* relate to the body of courses offered by the school. A group directly relates to a school's curriculum if the group's subject matter is actually taught, or will soon be taught, in a regularly offered course; if that subject matter concerns the body of courses as a whole; or if participation in the group is required for a particular course or results in academic credit. Whether a specific group is "noncurriculum related" will therefore depend on the particular school's curriculum, a determination that would be subject to factual findings well within the competence of trial courts to make. Pp. 237–243.

(c) Westside's existing student clubs include one or more "noncurriculum related student group[s]" under the foregoing standard. For example, Subsurfers, a club for students interested in scuba diving, is such a group, since its subject matter is not taught in any regularly offered course; it does not directly relate to the curriculum as a whole in the same way that a student government or similar group might; and participation in it is not required by any course and does not result in extra academic credit. Thus, the school has maintained a "limited open forum" under the Act and is prohibited from discriminating, based on the content of the students' speech, against students who wish to meet on school premises during noninstructional time. Pp. 243–247.

(d) Westside's denial of respondents' request to form a religious group constitutes a denial of "equal access" to the school's limited open forum. Although the school apparently permits respondents to meet informally after school, they seek equal access in the form of official recognition, which allows clubs to be part of the student activities program and carries with it access to the school newspaper, bulletin boards, public address system, and annual Club Fair. Since denial of such recognition is based on the religious content of the meetings respondents wish to conduct within the school's limited open forum, it violates the Act. P. 247.

JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE BLACKMUN, concluded in Part III that the Equal Access Act does not, on its face and as applied to Westside, contravene the Establishment Clause. The logic of *Widmar* v. *Vincent*, 454 U. S. 263, 271–275—which applied the three-part test of *Lemon* v. *Kurtzman*, 403 U. S. 602, 612–613, to hold that an "equal access" policy, at the state university level, does not violate the Clause—applies with equal force to the Act. Pp. 247–253.

(a) Because the Act on its face grants equal access to both secular and religious speech, it meets the secular purpose prong of the test. P. 248–249.

(b) The Act does not have the primary effect of advancing religion. There is a crucial difference between government and private speech endorsing religion, and, as Congress recognized in passing the Act, high school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis. Moreover, the Act expressly limits participation by school officials at student religious group meetings and requires that such meetings be held during "noninstructional time," and thereby avoids the problems of the students' emulation of teachers as role models and mandatory attendance requirements that might otherwise indicate official endorsement or coercion. Although the possibility of *student* peer pressure remains, there is little if any risk of government endorsement or coercion where no formal classroom activities are involved and no school officials actively participate. Pp. 249–252.

(c) Westside does not risk excessive entanglement between government and religion by complying with the Act, since the Act's provisions prohibit faculty monitors from participating in, nonschool persons from directing, controlling, or regularly attending, and school "sponsorship" of, religious meetings. Indeed, a denial of equal access might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech at meetings at which it might occur. Pp. 252–253.

JUSTICE KENNEDY, joined by JUSTICE SCALIA, agreeing that the Act does not violate the Establishment Clause, concluded that, since the accommodation of religion mandated by the Act is a neutral one, in the context of this case it suffices to inquire whether the Act violates either of two principles. First, the government cannot give direct benefits to religion in such a degree that it in fact establishes a state religion or religious faith, or tends to do so. *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 655 (KENNEDY, J., concurring in judgment in part and dissenting in part). Any incidental benefits that accompany official recognition of a religious club under the Act's criteria do not lead to the establishment of religion under this standard. See *Widmar* v. *Vincent*, 454 U. S. 263, 273–274. Second, the government cannot coerce any student to participate in a religious activity. Cf. *County of Allegheny*, *supra*, at 659. The Act also satisfies this standard, since nothing on its face or in the facts of this case demonstrates that its enforcement will pressure students to participate in such an activity. Pp. 258–259, 260–262.

JUSTICE MARSHALL, joined by JUSTICE BRENNAN, although agreeing that the Act as applied to Westside *could* withstand Establishment

Clause scrutiny, concluded that the inclusion of the Christian club in the type of forum presently established at the school, without more, will not assure government neutrality toward religion. Pp. 263–270.

(a) The introduction of religious speech into the public schools reveals the tension between the Free Speech and Establishment Clauses, because the failure of a school to stand apart from religious speech can convey a message that the school endorses, rather than merely tolerates, that speech. Thus, the particular vigilance this Court has shown in monitoring compliance with the Establishment Clause in elementary and secondary schools, see, *e. g.*, *Edwards* v. *Aguillard*, 482 U. S. 578, 583–584, must extend to monitoring the actual effects of an "equal access" policy. Pp. 263–264.

(b) The plurality misplaces its reliance on *Widmar* v. *Vincent*, 454 U. S. 263, in light of the substantially different character of the student forum at issue here. In *Widmar*, the state university maintained a wide-open and independent forum, affording many ideological organizations access to school facilities; took concrete steps to assure that the university's name was not identified with the policies or programs of any student group; and emphasized the autonomy of its students. Here, in contrast, Westside currently does not recognize any student group that advocates a controversial viewpoint and explicitly promotes its student clubs as a vital part of its total educational program and as a means of developing citizenship, shaping character, and inculcating fundamental values. Moreover, the absence of other advocacy-oriented clubs in the highly controlled environment provides a fertile ground for peer pressure. In these circumstances, Westside's failure to disassociate itself from the activities and goals of the Christian club poses a real danger that it will be viewed by students as endorsing religious activity. Pp. 264–269.

(c) Thus, Westside must take steps to fully disassociate itself from the Christian club's religious speech and avoid appearing to sponsor or endorse the club's goals. It could, for example, entirely discontinue encouraging student participation in clubs and clarify that the clubs are not instrumentally related to the school's overall mission. Or, if Westside sought to continue its general endorsement of those clubs that did not engage in controversial speech, it could do so if it also affirmatively disclaimed endorsement of the Christian club. Pp. 269–270.

O'CONNOR, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, II–B, and II–C, in which REHNQUIST, C. J., and WHITE, BLACKMUN, SCALIA, and KENNEDY, JJ., joined, and an opinion with respect to Part III, in which REHNQUIST, C. J., and WHITE and BLACKMUN, JJ., joined. KENNEDY, J., filed an opinion

concurring in part and concurring in the judgment, in which SCALIA, J., joined, *post*, p. 258. MARSHALL, J., filed an opinion concurring in the judgment, in which BRENNAN, J., joined, *post*, p. 262. STEVENS, J., filed a dissenting opinion, *post*, p. 270.

Allen E. Daubman argued the cause for petitioners. With him on the briefs were *Verne Moore, Jr.*, *Marc D. Stern*, and *Amy Adelson*.

Jay Alan Sekulow argued the cause for private respondents. With him on the brief were *Douglas W. Davis*, *Robert K. Skolrood*, *Douglas Veith*, and *Charles E. Rice*. *Solicitor General Starr* argued the cause for the United States. With him on the brief were *Acting Assistant Attorney General Schiffer*, *Deputy Solicitor General Roberts*, and *Anthony J. Steinmeyer*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Jewish Committee et al. by *Samuel Rabinove*, *Richard T. Foltin*, and *Lee Boothby*; for People for the American Way by *William R. Weissman*, *David W. Danner*, and *Susan M. Liss*; for the Anti-Defamation League of B'nai B'rith et al. by *Richard E. Shevitz*, *Ruti G. Teitel*, *Meyer Eisenberg*, *Jeffrey P. Sinensky*, *Steven M. Freeman*, and *Jill L. Kahn*; and for the National School Boards Association by *Gwendolyn H. Gregory*, *August W. Steinhilber*, and *Thomas A. Shannon*.

Briefs of *amici curiae* urging affirmance were filed for the Baptist Joint Committee on Public Affairs et al. by *Douglas Laycock*, *Samuel E. Ericsson*, *Forest D. Montgomery*, *Oliver S. Thomas*, *J. Brent Walker*, and *Wilford W. Kirton, Jr.*; for the Catholic League for Religious and Civil Rights by *Nancy J. Gannon*; for Concerned Women for America by *Jordan W. Lorence*, *Cimron Campbell*, and *Wendell R. Bird*; for Christian Advocates Serving Evangelism by *Wendell R. Bird*; for the Knights of Columbus by *Kevin T. Baine* and *Kevin J. Hasson*; for the Rutherford Institute et al. by *John W. Whitehead*; for the Southern Center for Law & Ethics by *Albert L. Jordan*; for the United States Catholic Conference by *Mark E. Chopko* and *John A. Liekweg*; for Tara Lynn Burr et al. by *Michael W. McConnell*, *Robert Hale*, *Michael J. Woodruff*, *Kimberlee W. Colby*, *Edward McGlynn Gaffney, Jr.*, *Thomas C. Hill*, *Robert J. Cynkar*, and *David L. White*; for *Richard Collin Mangrum, pro se*; and for Dr. David Moshman by *Andrew J. Ekonomou*.

Briefs of *amici curiae* were filed for the Campus Crusade for Christ, Inc., by *Robert R. Thompson*; and for Specialty Research Associates, Inc., by *Thomas Patrick Monaghan*.

JUSTICE O'CONNOR delivered the opinion of the Court, except as to Part III.

This case requires us to decide whether the Equal Access Act, 98 Stat. 1302, 20 U. S. C. §§ 4071–4074, prohibits Westside High School from denying a student religious group permission to meet on school premises during noninstructional time, and if so, whether the Act, so construed, violates the Establishment Clause of the First Amendment.

I

Respondents are current and former students at Westside High School, a public secondary school in Omaha, Nebraska. At the time this suit was filed, the school enrolled about 1,450 students and included grades 10 to 12; in the 1987–1988 school year, ninth graders were added. Westside High School is part of the Westside Community Schools system, an independent public school district. Petitioners are the Board of Education of Westside Community Schools (District 66); Wayne W. Meier, the president of the school board; James E. Findley, the principal of Westside High School; Kenneth K. Hanson, the superintendent of schools for the school district; and James A. Tangdell, the associate superintendent of schools for the school district.

Students at Westside High School are permitted to join various student groups and clubs, all of which meet after school hours on school premises. The students may choose from approximately 30 recognized groups on a voluntary basis. A list of student groups, together with a brief description of each provided by the school, appears in the Appendix to this opinion.

School Board Policy 5610 concerning "Student Clubs and Organizations" recognizes these student clubs as a "vital part of the total education program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills." App. 488. Board Policy 5610 also provides that each club shall have faculty sponsorship and that

"clubs and organizations shall not be sponsored by any political or religious organization, or by any organization which denies membership on the basis of race, color, creed, sex or political belief." App. 488. Board Policy 6180 on "Recognition of Religious Beliefs and Customs" requires that "[s]tudents adhering to a specific set of religious beliefs or holding to little or no belief shall be alike respected." App. 462. In addition, Board Policy 5450 recognizes its students' "Freedom of Expression," consistent with the authority of the board. App. 489.

There is no written school board policy concerning the formation of student clubs. Rather, students wishing to form a club present their request to a school official who determines whether the proposed club's goals and objectives are consistent with school board policies and with the school district's "Mission and Goals"—a broadly worded "blueprint" that expresses the district's commitment to teaching academic, physical, civic, and personal skills and values. *Id.*, at 473–478.

In January 1985, respondent Bridget Mergens met with Westside's Principal, Dr. Findley, and requested permission to form a Christian club at the school. The proposed club would have the same privileges and meet on the same terms and conditions as other Westside student groups, except that the proposed club would not have a faculty sponsor. According to the students' testimony at trial, the club's purpose would have been, among other things, to permit the students to read and discuss the Bible, to have fellowship, and to pray together. Membership would have been voluntary and open to all students regardless of religious affiliation.

Findley denied the request, as did Associate Superintendent Tangdell. In February 1985, Findley and Tangdell informed Mergens that they had discussed the matter with Superintendent Hanson and that he had agreed that her request should be denied. The school officials explained that school policy required all student clubs to have a faculty sponsor,

which the proposed religious club would not or could not have, and that a religious club at the school would violate the Establishment Clause. In March 1985, Mergens appealed the denial of her request to the board of education, but the board voted to uphold the denial.

Respondents, by and through their parents as next friends, then brought this suit in the United States District Court for the District of Nebraska seeking declaratory and injunctive relief. They alleged that petitioners' refusal to permit the proposed club to meet at Westside violated the Equal Access Act, 20 U. S. C. §§ 4071–4074, which prohibits public secondary schools that receive federal financial assistance and that maintain a "limited open forum" from denying "equal access" to students who wish to meet within the forum on the basis of the content of the speech at such meetings, §4071(a). Respondents further alleged that petitioners' actions denied them their First and Fourteenth Amendment rights to freedom of speech, association, and the free exercise of religion. Petitioners responded that the Equal Access Act did not apply to Westside and that, if the Act did apply, it violated the Establishment Clause of the First Amendment and was therefore unconstitutional. The United States intervened in the action pursuant to 28 U. S. C. § 2403 to defend the constitutionality of the Act.

The District Court entered judgment for petitioners. The court held that the Act did not apply in this case because Westside did not have a "limited open forum" as defined by the Act—all of Westside's student clubs, the court concluded, were curriculum-related and tied to the educational function of the school. The court rejected respondents' constitutional claims, reasoning that Westside did not have a limited public forum as set forth in *Widmar* v. *Vincent*, 454 U. S. 263 (1981), and that Westside's denial of respondents' request was reasonably related to legitimate pedagogical concerns, see *Hazelwood School Dist.* v. *Kuhlmeier*, 484 U. S. 260, 273 (1988).

The United States Court of Appeals for the Eighth Circuit reversed. 867 F. 2d 1076 (1989). The Court of Appeals held that the District Court erred in concluding that all the existing student clubs at Westside were curriculum related. The Court of Appeals noted that the "broad interpretation" advanced by the Westside school officials "would make the [Equal Access Act] meaningless" and would allow any school to "arbitrarily deny access to school facilities to any unfavored student club on the basis of its speech content," which was "exactly the result that Congress sought to prohibit by enacting the [Act]." *Id.*, at 1078. The Court of Appeals instead found that "[m]any of the student clubs at WHS, including the chess club, are noncurriculum-related." *Id.*, at 1079. Accordingly, because it found that Westside maintained a limited open forum under the Act, the Court of Appeals concluded that the Act applied to "forbi[d] discrimination against [respondents'] proposed club on the basis of its religious content." *Ibid.*

The Court of Appeals then rejected petitioners' contention that the Act violated the Establishment Clause. Noting that the Act extended the decision in *Widmar* v. *Vincent*, *supra*, to public secondary schools, the Court of Appeals concluded that "[a]ny constitutional attack on the [Act] must therefore be predicated on the difference between secondary school students and university students." 867 F. 2d, at 1080 (footnote omitted). Because "Congress considered the difference in the maturity level of secondary students and university students before passing the [Act]," the Court of Appeals held, on the basis of Congress' factfinding, that the Act did not violate the Establishment Clause. *Ibid.*

We granted certiorari, 492 U. S. 917 (1989), and now affirm.

II

A

In *Widmar* v. *Vincent*, *supra*, we invalidated, on free speech grounds, a state university regulation that prohibited

student use of school facilities "'for purposes of religious worship or religious teaching.'" *Id.*, at 265. In doing so, we held that an "equal access" policy would not violate the Establishment Clause under our decision in *Lemon* v. *Kurtzman*, 403 U. S. 602, 612–613 (1971). In particular, we held that such a policy would have a secular purpose, would not have the primary effect of advancing religion, and would not result in excessive entanglement between government and religion. *Widmar*, 454 U. S., at 271–274. We noted, however, that "[u]niversity students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion." *Id.*, at 274, n. 14.

In 1984, Congress extended the reasoning of *Widmar* to public secondary schools. Under the Equal Access Act, a public secondary school with a "limited open forum" is prohibited from discriminating against students who wish to conduct a meeting within that forum on the basis of the "religious, political, philosophical, or other content of the speech at such meetings." 20 U. S. C. §§ 4071(a) and (b). Specifically, the Act provides:

> "It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings." § 4071(a).

A "limited open forum" exists whenever a public secondary school "grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." § 4071(b). "Meeting" is defined to include "those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum." § 4072(3).

"Noninstructional time" is defined to mean "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends." § 4072(4). Thus, even if a public secondary school allows only one "noncurriculum related student group" to meet, the Act's obligations are triggered and the school may not deny other clubs, on the basis of the content of their speech, equal access to meet on school premises during noninstructional time.

The Act further specifies that a school "shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum" if the school uniformly provides that the meetings are voluntary and student initiated; are not sponsored by the school, the government, or its agents or employees; do not materially and substantially interfere with the orderly conduct of educational activities within the school; and are not directed, controlled, conducted, or regularly attended by "nonschool persons." §§ 4071(c)(1), (2), (4), and (5). "Sponsorship" is defined to mean "the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting." § 4072(2). If the meetings are religious, employees or agents of the school or government may attend only in a "nonparticipatory capacity." § 4071(c)(3). Moreover, a State may not influence the form of any religious activity, require any person to participate in such activity, or compel any school agent or employee to attend a meeting if the content of the speech at the meeting is contrary to that person's beliefs. §§ 4071 (d)(1), (2), and (4).

Finally, the Act does not "authorize the United States to deny or withhold Federal financial assistance to any school," § 4071(e), or "limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to

assure that attendance of students at meetings is voluntary," § 4071(f).

B

The parties agree that Westside High School receives federal financial assistance and is a public secondary school within the meaning of the Act. App. 57–58. The Act's obligation to grant equal access to student groups is therefore triggered if Westside maintains a "limited open forum"—*i. e.*, if it permits one or more "noncurriculum related student groups" to meet on campus before or after classes.

Unfortunately, the Act does not define the crucial phrase "noncurriculum related student group." Our immediate task is therefore one of statutory interpretation. We begin, of course, with the language of the statute. See, *e. g.*, *Mallard* v. *United States District Court, Southern District of Iowa*, 490 U. S. 296, 300 (1989); *United States* v. *James*, 478 U. S. 597, 604 (1986). The common meaning of the term "curriculum" is "the whole body of courses offered by an educational institution or one of its branches." Webster's Third New International Dictionary 557 (1976); see also Black's Law Dictionary 345 (5th ed. 1979) ("The set of studies or courses for a particular period, designated by a school or branch of a school"). Cf. *Hazelwood School Dist.* v. *Kuhlmeier*, 484 U. S., at 271 (high school newspaper produced as part of the school's journalism class was part of the curriculum). Any sensible interpretation of "noncurriculum related student group" must therefore be anchored in the notion that such student groups are those that are not related to the body of courses offered by the school. The difficult question is the degree of "unrelatedness to the curriculum" required for a group to be considered "noncurriculum related."

The Act's definition of the sort of "meeting[s]" that must be accommodated under the statute, § 4071(a), sheds some light on this question. "The term 'meeting' includes those activities of student groups which are . . . not *directly related* to the school curriculum." § 4072(3) (emphasis added). Con-

gress' use of the phrase "directly related" implies that student groups directly related to the subject matter of courses offered by the school do not fall within the "noncurriculum related" category and would therefore be considered "curriculum related."

The logic of the Act also supports this view, namely, that a curriculum-related student group is one that has more than just a tangential or attenuated relationship to courses offered by the school. Because the purpose of granting equal access is to prohibit discrimination between religious or political clubs on the one hand and other noncurriculum-related student groups on the other, the Act is premised on the notion that a religious or political club is itself likely to be a noncurriculum-related student group. It follows, then, that a student group that is "curriculum related" must at least have a more direct relationship to the curriculum than a religious or political club would have.

Although the phrase "noncurriculum related student group" nevertheless remains sufficiently ambiguous that we might normally resort to legislative history, see, *e. g.*, *James*, *supra*, at 606, we find the legislative history on this issue less than helpful. Because the bill that led to the Act was extensively rewritten in a series of multilateral negotiations after it was passed by the House and reported out of committee by the Senate, the Committee Reports shed no light on the language actually adopted. During congressional debate on the subject, legislators referred to a number of different definitions, and thus both petitioners and respondents can cite to legislative history favoring their interpretation of the phrase. Compare 130 Cong. Rec. 19223 (1984) (statement of Sen. Hatfield) (curriculum-related clubs are those that are "really a kind of extension of the classroom"), with *ibid.* (statement of Sen. Hatfield) (in response to question whether school districts would have full authority to decide what was curriculum related, "[w]e in no way seek to limit that discretion"). See Laycock, Equal Access and Moments of Silence: The Equal

Status of Religious Speech by Private Speakers, 81 Nw. U. L. Rev. 1, 37–39 (1986).

We think it significant, however, that the Act, which was passed by wide, bipartisan majorities in both the House and the Senate, reflects at least some consensus on a broad legislative purpose. The Committee Reports indicate that the Act was intended to address perceived widespread discrimination against religious speech in public schools, see H. R. Rep. No. 98–710, p. 4 (1984); S. Rep. No. 98–357, pp. 10–11 (1984), and, as the language of the Act indicates, its sponsors contemplated that the Act would do more than merely validate the status quo. The Committee Reports also show that the Act was enacted in part in response to two federal appellate court decisions holding that student religious groups could not, consistent with the Establishment Clause, meet on school premises during noninstructional time. See H. R. Rep. No. 98–710, *supra*, at 3–6 (discussing *Lubbock Civil Liberties Union* v. *Lubbock Independent School Dist.*, 669 F. 2d 1038, 1042–1048 (CA5 1982), cert. denied, 459 U. S. 1155–1156 (1983), and *Brandon* v. *Guilderland Bd. of Ed.*, 635 F. 2d 971 (CA2 1980), cert. denied, 454 U. S. 1123 (1981)); S. Rep. No. 98–357, *supra*, at 6–9, 11–14 (same). A broad reading of the Act would be consistent with the views of those who sought to end discrimination by allowing students to meet and discuss religion before and after classes.

In light of this legislative purpose, we think that the term "noncurriculum related student group" is best interpreted broadly to mean any student group that does not *directly* relate to the body of courses offered by the school. In our view, a student group directly relates to a school's curriculum if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic

credit. We think this limited definition of groups that directly relate to the curriculum is a commonsense interpretation of the Act that is consistent with Congress' intent to provide a low threshold for triggering the Act's requirements.

For example, a French club would directly relate to the curriculum if a school taught French in a regularly offered course or planned to teach the subject in the near future. A school's student government would generally relate directly to the curriculum to the extent that it addresses concerns, solicits opinions, and formulates proposals pertaining to the body of courses offered by the school. If participation in a school's band or orchestra were required for the band or orchestra classes, or resulted in academic credit, then those groups would also directly relate to the curriculum. The existence of such groups at a school would not trigger the Act's obligations.

On the other hand, unless a school could show that groups such as a chess club, a stamp collecting club, or a community service club fell within our description of groups that directly relate to the curriculum, such groups would be "noncurriculum related student groups" for purposes of the Act. The existence of such groups would create a "limited open forum" under the Act and would prohibit the school from denying equal access to any other student group on the basis of the content of that group's speech. Whether a specific student group is a "noncurriculum related student group" will therefore depend on a particular school's curriculum, but such determinations would be subject to factual findings well within the competence of trial courts to make.

Petitioners contend that our reading of the Act unduly hinders local control over schools and school activities, but we think that schools and school districts nevertheless retain a significant measure of authority over the type of officially recognized activities in which their students participate. See, *e. g.*, *Hazelwood School Dist.* v. *Kuhlmeier*, 484 U. S. 260 (1988); *Bethel School Dist. No. 403* v. *Fraser*, 478 U. S.

675 (1986). First, schools and school districts maintain their traditional latitude to determine appropriate subjects of instruction. To the extent that a school chooses to structure its course offerings and existing student groups to avoid the Act's obligations, that result is not prohibited by the Act. On matters of statutory interpretation, "[o]ur task is to apply the text, not to improve on it." *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 493 U. S. 120, 126 (1989). Second, the Act expressly does not limit a school's authority to prohibit meetings that would "materially and substantially interfere with the orderly conduct of educational activities within the school." § 4071(c)(4); cf. *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 509 (1969). The Act also preserves "the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary." § 4071(f). Finally, because the Act applies only to public secondary schools that receive federal financial assistance, § 4071(a), a school district seeking to escape the statute's obligations could simply forgo federal funding. Although we do not doubt that in some cases this may be an unrealistic option, Congress clearly sought to prohibit schools from discriminating on the basis of the content of a student group's speech, and that obligation is the price a federally funded school must pay if it opens its facilities to noncurriculum-related student groups.

The dissent suggests that "an extracurricular student organization is 'noncurriculum related' if it has as its purpose (or as part of its purpose) the advocacy of partisan theological, political, or ethical views." *Post*, at 276; see also *post*, at 271, 290 (Act is triggered only if school permits "controversial" or "distasteful" groups to use its facilities); *post*, at 291 ("noncurriculum" subjects are those that "'cannot properly be included in a public school curriculum'"). This interpretation of the Act, we are told, is mandated by Congress' intention to

"track our own Free Speech Clause jurisprudence," *post*, at 279, n. 10, by incorporating *Widmar*'s notion of a "limited public forum" into the language of the Act. *Post*, at 271–272.

This suggestion is flawed for at least two reasons. First, the Act itself neither uses the phrase "limited public forum" nor so much as hints that that doctrine is somehow "incorporated" into the words of the statute. The operative language of the statute, 20 U. S. C. § 4071(a), of course, refers to a "limited open forum," a term that is specifically defined in the next subsection, § 4071(b). Congress was presumably aware that "limited public forum," as used by the Court, is a term of art, see, *e. g.*, *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 45–49 (1983), and had it intended to import that concept into the Act, one would suppose that it would have done so explicitly. Indeed, Congress' deliberate choice to use a different term—and to define that term—can only mean that it intended to establish a standard different from the one established by our free speech cases. See Laycock, 81 Nw. U. L. Rev., at 36 ("The statutory 'limited open forum' is an artificial construct, and comparisons with the constitutional ['limited public forum'] cases can be misleading"). To paraphrase the dissent, "[i]f Congress really intended to [incorporate] *Widmar* for reasons of administrative clarity, Congress kept its intent well hidden, both in the statute and in the debates preceding its passage." *Post*, at 281–282, n. 15.

Second, and more significant, the dissent's reliance on the legislative history to support its interpretation of the Act shows just how treacherous that task can be. The dissent appears to agree with our view that the legislative history of the Act, even if relevant, is highly unreliable, see, *e. g.*, *post*, at 274–275, n. 5, and 281–282, n. 15, yet the interpretation it suggests rests solely on a few passing, general references by legislators to our decision in *Widmar*, see *post*, at 274, and n. 4. We think that reliance on legislative history is hazardous at best, but where "'not even the sponsors of the bill

knew what it meant,'" *post*, at 281, n. 15 (quoting Laycock, *supra*, at 38 (citation omitted)), such reliance cannot form a reasonable basis on which to interpret the text of a statute. For example, the dissent appears to place great reliance on a comment by Senator Levin that the Act extends the rule in *Widmar* to secondary schools, see *post*, at 274, n. 4, but Senator Levin's understanding of the "rule," expressed in the same breath as the statement on which the dissent relies, fails to support the dissent's reading of the Act. See 130 Cong. Rec. 19236 (1984) ("The pending amendment will allow students equal access to secondary schools student-initiated religious meetings before and after school where the school *generally* allows groups of secondary school students to meet during those times") (emphasis added). Moreover, a number of Senators, during the same debate, warned that some of the views stated did not reflect their own views. See, *e. g.*, *ibid.* ("I am troubled with the legislative history that you are making here") (statement of Sen. Chiles); *id.*, at 19237 ("[T]here have been a number of statements made on the floor today which may be construed as legislative history modifying what my understanding was or what anyone's understanding might be of this bill") (statement of Sen. Denton). The only thing that can be said with any confidence is that *some* Senators *may* have thought that the obligations of the Act would be triggered only when a school permits advocacy groups to meet on school premises during noninstructional time. That conclusion, of course, cannot bear the weight the dissent places on it.

C

The parties in this case focus their dispute on 10 of Westside's approximately 30 voluntary student clubs: Interact (a service club related to Rotary International); Chess Club; Subsurfers (a club for students interested in scuba diving); National Honor Society; Photography Club; Welcome to Westside Club (a club to introduce new students to the

school); Future Business Leaders of America; Zonta Club (the female counterpart to Interact); Student Advisory Board (student government); and Student Forum (student government). App. 60. Petitioners contend that all of these student activities are curriculum related because they further the goals of particular aspects of the school's curriculum. The Welcome to Westside Club, for example, helps "further the School's overall goal of developing effective citizens by requiring student members to contribute to their fellow students." Brief for Petitioners 16. The student government clubs "advance the goals of the School's political science classes by providing an understanding and appreciation of government processes." *Id.*, at 17. Subsurfers furthers "one of the essential goals of the Physical Education Department—enabling students to develop life-long recreational interests." *Id.*, at 18. The Chess Club "supplement[s] math and science courses because it enhances students' ability to engage in critical thought processes." *Id.*, at 18–19. Participation in Interact and the Zonta Club "promotes effective citizenship, a critical goal of the WHS curriculum, specifically the Social Studies Department." *Id.*, at 19.

To the extent that petitioners contend that "curriculum related" means anything remotely related to abstract educational goals, however, we reject that argument. To define "curriculum related" in a way that results in almost no schools having limited open fora, or in a way that permits schools to evade the Act by strategically describing existing student groups, would render the Act merely hortatory. See 130 Cong. Rec. 19222 (1984) (statement of Sen. Leahy) ("[A] limited open forum should be triggered by what a school does, not by what it says"). As the court below explained:

> "Allowing such a broad interpretation of 'curriculum-related' would make the [Act] meaningless. A school's administration could simply declare that it maintains a closed forum and choose which student clubs it wanted to allow by tying the purposes of those student clubs to

> some broadly defined educational goal. At the same time the administration could arbitrarily deny access to school facilities to any unfavored student club on the basis of its speech content. This is exactly the result that Congress sought to prohibit by enacting the [Act]. A public secondary school cannot simply declare that it maintains a closed forum and then discriminate against a particular student group on the basis of the content of the speech of that group." 867 F. 2d, at 1078.

See also *Garnett* v. *Renton School Dist. No. 403*, 874 F. 2d 608, 614 (CA9 1989) ("Complete deference [to the school district] would render the Act meaningless because school boards could circumvent the Act's requirements simply by asserting that all student groups are curriculum related").

Rather, we think it clear that Westside's existing student groups include one or more "noncurriculum related student groups." Although Westside's physical education classes apparently include swimming, see Record, Tr. of Preliminary Injunction Hearing 25, counsel stated at oral argument that scuba diving is not taught in any regularly offered course at the school, Tr. of Oral Arg. 6. Based on Westside's own description of the group, Subsurfers does not directly relate to the curriculum as a whole in the same way that a student government or similar group might. App. 485–486. Moreover, participation in Subsurfers is not required by any course at the school and does not result in extra academic credit. *Id.*, at 170–171, 236. Thus, Subsurfers is a "noncurriculum related student group" for purposes of the Act. Similarly, although math teachers at Westside have encouraged their students to play chess, *id.*, at 442–444, chess is not taught in any regularly offered course at the school, Tr. of Oral Arg. 6, and participation in the Chess Club is not required for any class and does not result in extra credit for any class, App. 302–304. The Chess Club is therefore another "noncurriculum related student group" at

Westside. Moreover, Westside's principal acknowledged at trial that the Peer Advocates program—a service group that works with special education classes—does not directly relate to any courses offered by the school and is not required by any courses offered by the school. *Id.*, at 231–233; see also *id.*, at 198–199 (participation in Peer Advocates is not required for any course and does not result in extra credit in any course). Peer Advocates would therefore also fit within our description of a "noncurriculum related student group." The record therefore supports a finding that Westside has maintained a limited open forum under the Act.

Although our definition of "noncurriculum related student activities" looks to a school's actual practice rather than its stated policy, we note that our conclusion is also supported by the school's own description of its student activities. As reprinted in the Appendix to this opinion, the school states that Band "is included in our regular curriculum"; Choir "is a course offered as part of the curriculum"; Distributive Education "is an extension of the Distributive Education class"; International Club is "developed through our foreign language classes"; Latin Club is "designed for those students who are taking Latin as a foreign language"; Student Publications "includes classes offered in preparation of the yearbook (Shield) and the student newspaper (Lance)"; Dramatics "is an extension of a regular academic class"; and Orchestra "is an extension of our regular curriculum." These descriptions constitute persuasive evidence that these student clubs directly relate to the curriculum. By inference, however, the fact that the descriptions of student activities such as Subsurfers and chess do not include such references strongly suggests that those clubs do not, by the school's own admission, directly relate to the curriculum. We therefore conclude that Westside permits "one or more noncurriculum related student groups to meet on school premises during noninstructional time," § 4071(b). Because Westside maintains a "limited open forum" under the Act, it is prohibited from

discriminating, based on the content of the students' speech, against students who wish to meet on school premises during noninstructional time.

The remaining statutory question is whether petitioners' denial of respondents' request to form a religious group constitutes a denial of "equal access" to the school's limited open forum. Although the school apparently permits respondents to meet informally after school, App. 315–316, respondents seek equal access in the form of official recognition by the school. Official recognition allows student clubs to be part of the student activities program and carries with it access to the school newspaper, bulletin boards, the public address system, and the annual Club Fair. *Id.*, at 434–435. Given that the Act explicitly prohibits denial of "equal access . . . to . . . any students who wish to conduct a meeting within [the school's] limited open forum" on the basis of the religious content of the speech at such meetings, § 4071(a), we hold that Westside's denial of respondents' request to form a Christian club denies them "equal access" under the Act.

Because we rest our conclusion on statutory grounds, we need not decide—and therefore express no opinion on—whether the First Amendment requires the same result.

III

Petitioners contend that even if Westside has created a limited open forum within the meaning of the Act, its denial of official recognition to the proposed Christian club must nevertheless stand because the Act violates the Establishment Clause of the First Amendment, as applied to the States through the Fourteenth Amendment. Specifically, petitioners maintain that because the school's recognized student activities are an integral part of its educational mission, official recognition of respondents' proposed club would effectively incorporate religious activities into the school's official program, endorse participation in the religious club, and pro-

vide the club with an official platform to proselytize other students.

We disagree. In *Widmar*, we applied the three-part *Lemon* test to hold that an "equal access" policy, at the university level, does not violate the Establishment Clause. See 454 U. S., at 271–275 (applying *Lemon*, 403 U. S., at 612–613). We concluded that "an open-forum policy, including nondiscrimination against religious speech, would have a secular purpose," 454 U. S., at 271 (footnotes omitted), and would in fact *avoid* entanglement with religion. See *id.*, at 272, n. 11 ("[T]he University would risk greater 'entanglement' by attempting to enforce its exclusion of 'religious worship' and 'religious speech' "). We also found that although incidental benefits accrued to religious groups who used university facilities, this result did not amount to an establishment of religion. First, we stated that a university's forum does not "confer any imprimatur of state approval on religious sects or practices." *Id.*, at 274. Indeed, the message is one of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion. "The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *McDaniel* v. *Paty*, 435 U. S. 618, 641 (1978) (BRENNAN, J., concurring in judgment). Second, we noted that "[t]he [University's] provision of benefits to [a] broad . . . spectrum of groups"—both nonreligious and religious speakers—was "an important index of secular effect." 454 U. S., at 274.

We think the logic of *Widmar* applies with equal force to the Equal Access Act. As an initial matter, the Act's prohibition of discrimination on the basis of "political, philosophical, or other" speech as well as religious speech is a sufficient basis for meeting the secular purpose prong of the *Lemon* test. See *Edwards* v. *Aguillard*, 482 U. S. 578, 586 (1987)

(Court "is normally deferential to a [legislative] articulation of a secular purpose"); *Mueller* v. *Allen*, 463 U. S. 388, 394–395 (1983) (Court is "reluctan[t] to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute"). Congress' avowed purpose—to prevent discrimination against religious and other types of speech—is undeniably secular. See *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327, 335–336 (1987); *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 773 (1973). Cf. 42 U. S. C. § 2000e–2(a) (prohibiting employment discrimination on grounds of race, color, religion, sex, or national origin). Even if some legislators were motivated by a conviction that religious speech in particular was valuable and worthy of protection, that alone would not invalidate the Act, because what is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law. Because the Act on its face grants equal access to both secular and religious speech, we think it clear that the Act's purpose was not to "'endorse or disapprove of religion,'" *Wallace* v. *Jaffree*, 472 U. S. 38, 56 (1985) (quoting *Lynch* v. *Donnelly*, 465 U. S. 668, 690 (1984) (O'CONNOR, J., concurring)).

Petitioners' principal contention is that the Act has the primary effect of advancing religion. Specifically, petitioners urge that, because the student religious meetings are held under school aegis, and because the State's compulsory attendance laws bring the students together (and thereby provide a ready-made audience for student evangelists), an objective observer in the position of a secondary school student will perceive official school support for such religious meetings. See *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 593 (1989) (Establishment Clause inquiry is whether the government "'convey[s] or attempt[s] to convey a message that religion or

a particular religious belief is favored or preferred'") (quoting *Wallace* v. *Jaffree*, *supra*, at 70 (O'CONNOR, J., concurring in part and concurring in judgment)).

We disagree. First, although we have invalidated the use of public funds to pay for teaching state-required subjects at parochial schools, in part because of the risk of creating "a crucial symbolic link between government and religion, thereby enlisting—at least in the eyes of impressionable youngsters—the powers of government to the support of the religious denomination operating the school," *School Dist. of Grand Rapids* v. *Ball*, 473 U. S. 373, 385 (1985), there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis. Cf. *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503 (1969) (no danger that high school students' symbolic speech implied school endorsement); *West Virginia State Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943) (same). See generally Note, 92 Yale. L. J. 499, 507–509 (1983) (summarizing research in adolescent psychology). The proposition that schools do not endorse everything they fail to censor is not complicated. "[P]articularly in this age of massive media information . . . the few years difference in age between high school and college students [does not] justif[y] departing from *Widmar*." *Bender* v. *Williamsport Area School Dist.*, 475 U. S. 534, 556 (1986) (Powell, J., dissenting).

Indeed, we note that Congress specifically rejected the argument that high school students are likely to confuse an equal access policy with state sponsorship of religion. See S. Rep. No. 98–357, p. 8 (1984); *id.*, at 35 ("[S]tudents below the college level are capable of distinguishing between State-initiated, school sponsored, or teacher-led religious

speech on the one hand and student-initiated, student-led religious speech on the other"). Given the deference due "the duly enacted and carefully considered decision of a coequal and representative branch of our Government," *Walters* v. *National Assn. of Radiation Survivors*, 473 U. S. 305, 319 (1985); see also *Rostker* v. *Goldberg*, 453 U. S. 57, 64 (1981), we do not lightly second-guess such legislative judgments, particularly where the judgments are based in part on empirical determinations.

Second, we note that the Act expressly limits participation by school officials at meetings of student religious groups, §§ 4071(c)(2) and (3), and that any such meetings must be held during "noninstructional time," § 4071(b). The Act therefore avoids the problems of "the students' emulation of teachers as role models" and "mandatory attendance requirements," *Edwards* v. *Aguillard*, 482 U. S., at 584; see also *Illinois ex rel. McCollum* v. *Board of Ed. of School Dist. No. 71, Champaign County*, 333 U. S. 203, 209–210 (1948) (release time program invalid where students were "released in part from their legal duty [to attend school] upon the condition that they attend the religious classes"). To be sure, the possibility of *student* peer pressure remains, but there is little if any risk of official state endorsement or coercion where no formal classroom activities are involved and no school officials actively participate. Moreover, petitioners' fear of a mistaken inference of endorsement is largely self-imposed, because the school itself has control over any impressions it gives its students. To the extent a school makes clear that its recognition of respondents' proposed club is not an endorsement of the views of the club's participants, see *Widmar*, 454 U. S., at 274, n. 14 (noting that university student handbook states that the university's name will not be identified with the aims, policies, or opinions of any student organization or its members), students will reasonably understand that the school's official recognition of the club evinces neutrality toward, rather than endorsement of, religious speech.

Third, the broad spectrum of officially recognized student clubs at Westside, and the fact that Westside students are free to initiate and organize additional student clubs, see App. 221–222, counteract any possible message of official endorsement of or preference for religion or a particular religious belief. See *Widmar*, 454 U. S., at 274 ("The provision of benefits to so broad a spectrum of groups is an important index of secular effect"). Although a school may not itself lead or direct a religious club, a school that permits a student-initiated and student-led religious club to meet after school, just as it permits any other student group to do, does not convey a message of state approval or endorsement of the particular religion. Under the Act, a school with a limited open forum may not lawfully deny access to a Jewish students' club, a Young Democrats club, or a philosophy club devoted to the study of Nietzsche. To the extent that a religious club is merely one of many different student-initiated voluntary clubs, students should perceive no message of government endorsement of religion. Thus, we conclude that the Act does not, at least on its face and as applied to Westside, have the primary effect of advancing religion. See *id.*, at 275 ("At least in the absence of empirical evidence that religious groups will dominate [the university's] open forum, . . . the advancement of religion would not be the forum's 'primary effect'").

Petitioners' final argument is that by complying with the Act's requirements, the school risks excessive entanglement between government and religion. The proposed club, petitioners urge, would be required to have a faculty sponsor who would be charged with actively directing the activities of the group, guiding its leaders, and ensuring balance in the presentation of controversial ideas. Petitioners claim that this influence over the club's religious program would entangle the government in day-to-day surveillance of religion of the type forbidden by the Establishment Clause.

Under the Act, however, faculty monitors may not participate in any religious meetings, and nonschool persons may not direct, control, or regularly attend activities of student groups. §§ 4071(c)(3) and (5). Moreover, the Act prohibits school "sponsorship" of any religious meetings, § 4071(c)(2), which means that school officials may not promote, lead, or participate in any such meeting, § 4072(2). Although the Act permits "[t]he assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes," *ibid.*, such custodial oversight of the student-initiated religious group, merely to ensure order and good behavior, does not impermissibly entangle government in the day-to-day surveillance or administration of religious activities. See *Tony and Susan Alamo Foundation* v. *Secretary of Labor*, 471 U. S. 290, 305–306 (1985). Indeed, as the Court noted in *Widmar*, a denial of equal access to religious speech might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech at meetings at which such speech might occur. See 454 U. S., at 272, n. 11.

Accordingly, we hold that the Equal Access Act does not on its face contravene the Establishment Clause. Because we hold that petitioners have violated the Act, we do not decide respondents' claims under the Free Speech and Free Exercise Clauses. For the foregoing reasons, the judgment of the Court of Appeals is affirmed.

It is so ordered.

APPENDIX TO OPINION OF THE COURT

Plaintiff's Trial Exhibit 63

STUDENT ACTIVITIES

August, 1984

BAND—This activity is included in our regular curriculum. Extensions of this activity include Marching Band, Ensembles, Pep Band, and Concert Jazz Band. Performances,

presentations, and programs are presented throughout the school year.

CHESS CLUB—This activity is for those interested in playing chess. Opportunities to play are held after school throughout the school year.

CHEERLEADERS—A girls sport cheerleader team is made up of a junior varsity and varsity. The boys sport cheerleaders consist of sophomores, junior varsity, and varsity. Tryouts for these spirit groups are held each spring.

CHOIR—This is a course offered as part of the curriculum. Extensions of this class include Boys and Girls Glee, Warrior Voices, and Concert and Chamber Choirs. Membership in these activities are *[sic]* determined by enrollment and tryouts.

CLASS OFFICERS—Voting and selection of junior and senior class officers for the following year are held each spring. Students interested in being a class officer will need to secure support, be willing to make a presentation to their class, and serve their class in an officer capacity for the following year.

DISTRIBUTIVE EDUCATION (DECA)—This is an organization that is an extension of the Distributive Education class. Membership in this activity is offered to those students involved in D. E. The club for the current year is formulated at the beginning of school each fall.

SPEECH & DEBATE—This is an activity for students interested in participating on a competitive level in both speech and debate. The season begins the first week in November and continues through March.

DRILL SQUAD & SQUIRES—These are spirit groups primarily concerned with performing at half time at football and basketball games. Selection for these squads is made in the spring of each school year. These marching units are also support groups for other athletic teams.

FUTURE BUSINESS LEADERS OF AMERICA (FBLA)—This is a club designed for students interested in pursuing the field of business. It is open to any student with an interest. Membership begins in the fall of each school year.

FUTURE MEDICAL ASSISTANTS (FMA)—This is a club designed for students with an interest in pursuing any area of medicine. The organization assists in securing blood donations from individuals at Westside High School for the Red Cross. Meetings are held to inform the membership about opportunities in the medical field. Memberships are accepted at the beginning of school each fall.

INTERACT—This is a boys volunteer organization associated with the Rotary Club of America. Its basic function is to do volunteer work within the community. They *[sic]* are also a support and spirit group for our athletic teams. Membership is open to 11th and 12th grade boys; with membership opportunities being available in the fall of each school year.

INTERNATIONAL CLUB—This is a club designed to help students understand people from other countries and is developed through our foreign language classes. French, German, Spanish, and Latin teachers encourage membership in this organization in the fall of each year. Sponsorship of foreign students, who attend Westside, is one of their *[sic]* major activities.

LATIN CLUB (Junior Classical League)—This is a club designed for those students who are taking Latin as a foreign language. This club competes in competitive situations between schools and is involved with state competition as well. Students have the opportunity to join JCL beginning in the fall of each school year.

MATH CLUB—This club is for any student interested in mathematics. Meetings are held periodically during the school year.

STUDENT PUBLICATIONS—This activity includes classes offered in preparation of the yearbook (Shield) and the student newspaper (Lance). Opportunities to learn about journalism are provided for students interested in these areas. Membership in Quill and Scroll is an extension of a student's involvement in school publications.

STUDENT FORUM—Each homeroom elects one representative as a member of the student forum. Their responsibility is to provide ideas, make suggestions, and serve as one informational group to the staff and administration for student government. Selections are made for this membership in the fall of each school year.

DRAMATICS—This activity is an extension of a regular academic class. School plays, one-act plays, and musicals are provided for students with an interest and ability in these areas. Tryouts for these productions are announced prior to the selection of individuals for these activities.

CREATIVE WRITING CLUB—This is an organization that provides students, with the interest and capability, an opportunity to do prose and poetry writing. This club meets periodically throughout the year and publishes the students' work. Any student with an interest is encouraged to become a member.

PHOTOGRAPHY CLUB—This is a club for the student who has the interest and/or ability in photography. Students have an opportunity to take photos of school activities. A dark room is provided for the students' use. Membership in this organization begins in the fall of each school year.

ORCHESTRA—This activity is an extension of our regular curriculum. Performances are given periodically throughout the year. Tryouts are held for some special groups within the orchestra. All students signed up for that class have the opportunity to try out.

OUTDOOR EDUCATION—This activity is an opportunity for interested students to be involved in the elementary

school Outdoor Education Program. High school students are used as camp counselors and leaders for this activity. Students are solicited to help work prior to the fall and spring Outdoor Ed Program.

SWIMMING TIMING TEAM—Offers an interested student a chance to be a part of the Timing Team that is used during the competitive swimming season. Regular season meets, invitational meets, and the metro swim meet are swimming activities at which these volunteers will work. Membership in this group is solicited prior to the beginning of the competitive season.

STUDENT ADVISORY BOARD (SAB)—Is another facet of student government. Members are elected from each class to represent the student body. These elections are held at the same time class officers are elected. Any student has an opportunity to submit their name for consideration.

INTRAMURALS—Are offered to Westside students these following times. Basketball begins the latter part of November and continues through February. Co-educational volleyball is the spring intramural activity. Announcements are made to students so they can organize and formulate teams prior to the beginning of these activities.

COMPETITIVE ATHLETICS—Westside High School offers students the opportunity to try out and participate in eighteen varsity sports. Twenty-seven different competitive teams are available for students at each grade level. The seasons when these are offered and the procedures for getting involved can be found in the Warrior Bulletin that is published and distributed in August, prior to the opening of school.

ZONTA CLUB (Z Club)—Is a volunteer club for girls associated with Zonta International. Approximately one hundred junior and senior girls are involved in this volunteer organization. Eleventh and twelfth grade students are encouraged to join in the fall of each school year.

SUBSURFERS—Is a club designed for students interested in learning about skin and scuba diving and other practical applications of that sport. Opportunities in the classroom and in our pool are made available for students involved in this activity. Membership is solicited in the fall and spring of each year.

WELCOME TO WESTSIDE CLUB—Is an organization for students who are interested in helping students new to District 66 and to Westside High School. Activities are held for them which are geared toward helping them become a part of our school curriculum and activities.

WRESTLING AUXILIARY—Is for girls interested in supporting our competitive wrestling team. Membership is solicited prior to the competitive wrestling season.

NATIONAL HONOR SOCIETY—Westside Honor Society is a chapter of the national organization and is bound by its rules and regulations. It is open to seniors who are in the upper 15% of their class. Westside in practice and by general agreement of the local chapter has inducted only those juniors in the upper 7% of their class. The selection is made not only upon scholarship but also character, leadership, and service. A committee meets and selects those students who they believe represent the high qualities of the organization. Induction into NHS is held in the spring of each year.

JUSTICE KENNEDY, with whom JUSTICE SCALIA joins, concurring in part and concurring in the judgment.

The Court's interpretation of the statutory term "noncurriculum related groups" is proper and correct, in my view, and I join Parts I and II of the Court's opinion. I further agree that the Act does not violate the Establishment Clause, and so I concur in the judgment; but my view of the analytic premise that controls the establishment question differs from that employed by the plurality. I write to explain

why I cannot join all that is said in Part III of JUSTICE O'CONNOR's opinion.

I

A brief initial comment on the statutory issue is in order. The student clubs recognized by Westside school officials are a far cry from the groups given official recognition by university officials in *Widmar* v. *Vincent*, 454 U. S. 263 (1981). As JUSTICE STEVENS points out in dissent, one of the consequences of the statute, as we now interpret it, is that clubs of a most controversial character might have access to the student life of high schools that in the past have given official recognition only to clubs of a more conventional kind. See *post*, at 271, 276.

It must be apparent to all that the Act has made a matter once left to the discretion of local school officials the subject of comprehensive regulation by federal law. This decision, however, was for Congress to make, subject to constitutional limitations. Congress having decided in favor of legislative intervention, it faced the task of formulating general statutory standards against the background protections of the Free Speech Clause, as well as the Establishment and Free Exercise Clauses. Given the complexities of our own jurisprudence in these areas, there is no doubt that the congressional task was a difficult one. While I cannot pretend that the language Congress used in the Act is free from ambiguity in some of its vital provisions, the Court's interpretation of the phrase "noncurriculum related" seems to me to be the most rational and indeed the most plausible interpretation available, given the words and structure of the Act and the constitutional implications of the subject it addresses.

There is one structural feature of the statute that should be noted. The opinion of the Court states that "[i]f the meetings are religious, employees or agents of the school or government may attend only in a 'nonparticipatory capacity.'" *Ante*, at 236 (quoting 20 U. S. C. § 4071(c)(3)). This is based upon a provision in the Act in which nonparticipation is one

of several statutory criteria that a school must meet in order to "be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum." § 4071(c). It is not altogether clear, however, whether satisfaction of these criteria is the sole means of meeting the statutory requirement that schools with noncurriculum related student groups provide a "fair opportunity" to religious clubs. § 4071(a). Although we need not answer it today, left open is the question whether school officials may prove that they are in compliance with the statute without satisfying all of the criteria in § 4071(c). But in the matter before us, the school has not attempted to comply with the statute through any means, and we have only to determine whether it is possible for the statute to be implemented in a constitutional manner.

II

I agree with the plurality that a school complying with the statute by satisfying the criteria in § 4071(c) does not violate the Establishment Clause. The accommodation of religion mandated by the Act is a neutral one, and in the context of this case it suffices to inquire whether the Act violates either one of two principles. The first is that the government cannot "give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.'" *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 659 (1989) (KENNEDY, J., concurring in judgment in part and dissenting in part) (quoting *Lynch* v. *Donnelly*, 465 U. S. 668, 678 (1984)). Any incidental benefits that accompany official recognition of a religious club under the criteria set forth in the § 4071(c) do not lead to the establishment of religion under this standard. See *Widmar*, *supra*, at 273–274. The second principle controlling the case now before us, in my view, is that the government cannot coerce any student to participate in a religious activity. Cf. *County of Allegheny*, *supra*, at 659. The Act is consistent with this stand-

ard as well. Nothing on the face of the Act or in the facts of the case as here presented demonstrates that enforcement of the statute will result in the coercion of any student to participate in a religious activity. The Act does not authorize school authorities to require, or even to encourage, students to become members of a religious club or to attend a club's meetings, see §§ 4071(c), (d), 4072(2); the meetings take place while school is not in session, see §§ 4071(b), 4072(4); and the Act does not compel any school employee to participate in, or to attend, a club's meetings or activities, see §§ 4071(c), (d)(4).

The plurality uses a different test, one which asks whether school officials, by complying with the Act, have endorsed religion. It is true that when government gives impermissible assistance to a religion it can be said to have "endorsed" religion; but endorsement cannot be the test. The word endorsement has insufficient content to be dispositive. And for reasons I have explained elsewhere, see *Allegheny County*, *supra*, its literal application may result in neutrality in name but hostility in fact when the question is the government's proper relation to those who express some religious preference.

I should think it inevitable that a public high school "endorses" a religious club, in a commonsense use of the term, if the club happens to be one of many activities that the school permits students to choose in order to further the development of their intellect and character in an extracurricular setting. But no constitutional violation occurs if the school's action is based upon a recognition of the fact that membership in a religious club is one of many permissible ways for a student to further his or her own personal enrichment. The inquiry with respect to coercion must be whether the government imposes pressure upon a student to participate in a religious activity. This inquiry, of course, must be undertaken with sensitivity to the special circumstances that exist in a secondary school where the line between voluntary and

coerced participation may be difficult to draw. No such coercion, however, has been shown to exist as a necessary result of this statute, either on its face or as respondents seek to invoke it on the facts of this case.

For these reasons, I join Parts I and II of the Court's opinion and concur in the judgment.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, concurring in the judgment.

I agree with the majority that "noncurriculum" must be construed broadly to "prohibit schools from discriminating on the basis of the content of a student group's speech." *Ante*, at 241. As the majority demonstrates, such a construction "is consistent with Congress' intent to provide a low threshold for triggering the Act's requirements." *Ante*, at 240. In addition, to the extent that Congress intended the Act to track this Court's free speech jurisprudence, as the dissent argues, *post*, at 279, n. 10, the majority's construction is faithful to our commitment to nondiscriminatory access to open fora in public schools. *Widmar* v. *Vincent*, 454 U. S. 263, 267 (1981). When a school allows student-initiated clubs not directly tied to the school's curriculum to use school facilities, it has "created a forum generally open to student groups" and is therefore constitutionally prohibited from enforcing a "content-based exclusion" of other student speech. *Id.*, at 277. In this respect, the Act as construed by the majority simply codifies in statute what is already constitutionally mandated: schools may not discriminate among student-initiated groups that seek access to school facilities for expressive purposes not directly related to the school's curriculum.

The Act's low threshold for triggering equal access, however, raises serious Establishment Clause concerns where secondary schools with fora that differ substantially from the forum in *Widmar* are required to grant access to student religious groups. Indeed, as applied in the present case, the Act mandates a religious group's access to a forum that is dedicated to promoting fundamental values and citizenship as

defined by the school. The Establishment Clause does not forbid the operation of the Act in such circumstances, but it does require schools to change their relationship to their fora so as to disassociate themselves effectively from religious clubs' speech. Thus, although I agree with the plurality that the Act as applied to Westside *could* withstand Establishment Clause scrutiny, *ante*, at 247–253 (O'CONNOR, J., joined by REHNQUIST, C. J., and WHITE and BLACKMUN, JJ.), I write separately to emphasize the steps Westside must take to avoid appearing to endorse the Christian club's goals. The plurality's Establishment Clause analysis pays inadequate attention to the differences between this case and *Widmar* and dismisses too lightly the distinctive pressures created by Westside's highly structured environment.

I

A

This case involves the intersection of two First Amendment guarantees—the Free Speech Clause and the Establishment Clause. We have long regarded free and open debate over matters of controversy as necessary to the functioning of our constitutional system. See, *e. g.*, *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 95–96 ((1972) ("To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship"). That the Constitution requires toleration of speech over its suppression is no less true in our Nation's schools. See *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 512 (1969); *Keyishian* v. *Board of Regents of Univ. of N. Y.*, 385 U. S. 589, 603 (1967); *Hazelwood School Dist.* v. *Kuhlmeier*, 484 U. S. 260, 280–281 (1988) (BRENNAN, J., dissenting).

But the Constitution also demands that the State not take action that has the primary effect of advancing religion. See, *e. g.*, *Lemon* v. *Kurtzman*, 403 U. S. 602, 612 (1971).

The introduction of religious speech into the public schools reveals the tension between these two constitutional commitments, because the failure of a school to stand apart from religious speech can convey a message that the school endorses rather than merely tolerates that speech. Recognizing the potential dangers of school-endorsed religious practice, we have shown particular "vigilan[ce] in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards* v. *Aguillard*, 482 U. S. 578, 583–584 (1987). See also *Wallace* v. *Jaffree*, 472 U. S. 38, 40 (1985) (invalidating statute authorizing a moment of silence in public schools for meditation or voluntary prayer); *Illinois ex rel. McCollum* v. *Board of Ed. of School Dist. No. 71, Champaign County*, 333 U. S. 203 (1948) (invalidating statute providing for voluntary religious education in the public schools). This vigilance must extend to our monitoring of the actual effects of an "equal access" policy. If public schools are perceived as conferring the *imprimatur* of the State on religious doctrine or practice as a result of such a policy, the nominally "neutral" character of the policy will not save it from running afoul of the Establishment Clause.*

B

We addressed at length the potential conflict between toleration and endorsement of religious speech in *Widmar*. There, a religious study group sought the same access to university facilities that the university afforded to over 100

*As a majority of this Court today holds, see *ante*, at 249–250 (O'CONNOR, J., joined by REHNQUIST, C. J., and WHITE and BLACKMUN, JJ.); *infra*, at 270, the Establishment Clause proscribes public schools from "conveying a message 'that religion or a particular religious belief is favored or preferred,'" *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 627 (1989) (quoting *Wallace* v. *Jaffree*, 472 U. S. 38, 70 (1985) (O'CONNOR, J., concurring in part and concurring in judgment)), even if such schools do not actually "impos[e] pressure upon a student to participate in a religious activity," *ante*, at 261 (KENNEDY, J., concurring in part and concurring in judgment).

officially recognized student groups, including many political organizations. In those circumstances, we concluded that granting religious organizations similar access to the public forum would have neither the purpose nor the primary effect of advancing religion. 454 U. S., at 270–275. The plurality suggests that our conclusion in *Widmar* controls this case. *Ante*, at 248–253. But the plurality fails to recognize that the wide-open and independent character of the student forum in *Widmar* differs substantially from the forum at Westside.

Westside currently does not recognize any student club that advocates a controversial viewpoint. Indeed, the clubs at Westside that trigger the Act involve scuba diving, chess, and counseling for special education students. *Ante*, at 245–246. As a matter of school policy, Westside encourages student participation in clubs based on a broad conception of its educational mission. See App. 488; *ante*, at 231. That mission comports with the Court's acknowledgment "that public schools are vitally important 'in the preparation of individuals for participation as citizens,' and as vehicles for 'inculcating fundamental values necessary to the maintenance of a democratic political system.'" *Board of Education, Island Trees Union Free School Dist. No. 26* v. *Pico*, 457 U. S. 853, 864 (1982) (plurality) (quoting *Ambach* v. *Norwick*, 441 U. S. 68, 76–77 (1979)). Given the nature and function of student clubs at Westside, the school makes no effort to disassociate itself from the activities and goals of its student clubs.

The entry of religious clubs into such a realm poses a real danger that those clubs will be viewed as part of the school's effort to inculcate fundamental values. The school's message with respect to its existing clubs is not one of toleration but one of endorsement. As the majority concedes, the program is part of the "district's commitment to teaching academic, physical, civic, and personal skills and values." *Ante*, at 232. But although a school may permissibly encourage its students to become well rounded as student-athletes, student-musicians, and student-tutors, the Constitution for-

bids schools to encourage students to become well rounded as student-worshippers. Neutrality towards religion, as required by the Constitution, is not advanced by requiring a school that endorses the goals of some noncontroversial secular organizations to endorse the goals of religious organizations as well.

The fact that the Act, when triggered, provides access to political as well as religious speech does not ameliorate the potential threat of endorsement. The breadth of beneficiaries under the Act does suggest that the Act may satisfy the "secular purpose" requirement of the Establishment Clause inquiry we identified in *Lemon*, *supra*, at 612–613. But see *post*, at 284–285, n. 20 (STEVENS, J., dissenting). But the crucial question is how the Act affects each school. If a school already houses numerous ideological organizations, then the addition of a religion club will most likely not violate the Establishment Clause because the risk that students will erroneously attribute the views of the religion club to the school is minimal. To the extent a school tolerates speech by a wide range of ideological clubs, students cannot reasonably understand the school to endorse all of the groups' divergent and contradictory views. But if the religion club is the sole advocacy-oriented group in the forum, or one of a very limited number, and the school continues to promote its student-club program as instrumental to citizenship, then the school's failure to disassociate itself from the religious activity will reasonably be understood as an endorsement of that activity. That political and other advocacy-oriented groups are permitted to participate in a forum that, through school support and encouragement, is devoted to fostering a student's civic identity does not ameliorate the appearance of school endorsement unless the invitation is accepted and the forum is transformed into a forum like that in *Widmar*.

For this reason, the plurality's reliance on *Widmar* is misplaced. The University of Missouri took concrete steps to ensure "that the University's name will not 'be identified in

any way with the aims, policies, programs, products, or opinions of any organization or its members,'" 454 U. S., at 274, n. 14 (quoting University of Missouri student handbook). Westside, in contrast, explicitly promotes its student clubs "as a vital part of the total education program [and] as a means of developing citizenship." App. 488. And while the University of Missouri recognized such clubs as the Young Socialist Alliance and the Young Democrats, *Chess* v. *Widmar*, 635 F. 2d 1310, 1312, n. 1, (CA8 1980), Westside has recognized no such political clubs, App. 488.

The different approaches to student clubs embodied in these policies reflect a significant difference, for Establishment Clause purposes, between the respective roles that Westside High School and the University of Missouri attempt to play in their students' lives. To the extent that a school emphasizes the autonomy of its students, as does the University of Missouri, there is a corresponding decrease in the likelihood that student speech will be regarded as school speech. Conversely, where a school such as Westside regards its student clubs as a mechanism for defining and transmitting fundamental values, the inclusion of a religious club in the school's program will almost certainly signal school endorsement of the religious practice.

Thus, the underlying difference between this case and *Widmar* is not that college and high school students have varying capacities to perceive the subtle differences between toleration and endorsement, but rather that the University of Missouri and Westside actually choose to define their respective missions in different ways. That high schools tend to emphasize student autonomy less than universities may suggest that high school administrators tend to perceive a difference in the maturity of secondary and university students. But the school's behavior, not the purported immaturity of high school students, is dispositive. If Westside stood apart from its club program and expressed the view, endorsed by Congress through its passage of the Act, that high school stu-

dents are capable of engaging in wide-ranging discussion of sensitive and controversial speech, the inclusion of religious groups in Westside's forum would confirm the school's commitment to nondiscrimination. Here, though, the Act requires the school to permit religious speech in a forum explicitly designed to advance the school's interest in shaping the character of its students.

The comprehensiveness of the access afforded by the Act further highlights the Establishment Clause dangers posed by the Act's application to fora such as Westside's. The Court holds that "[o]fficial recognition allows student clubs to be part of the student activities program and carries with it access to the school newspaper, bulletin boards, the public address system, and the annual Club Fair." *Ante*, at 247 (citing App. 434–435). Students would be alerted to the meetings of the religion club over the public address system; they would see religion club material posted on the official school bulletin board and club notices in the school newspaper; they would be recruited to join the religion club at the school-sponsored Club Fair. If a school has a variety of ideological clubs, as in *Widmar*, I agree with the plurality that a student is likely to understand that "a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." *Ante*, at 250. When a school has a religion club but no other political or ideological organizations, however, that relatively fine distinction may be lost.

Moreover, in the absence of a truly robust forum that includes the participation of more than one advocacy-oriented group, the presence of a religious club could provide a fertile ground for peer pressure, especially if the club commanded support from a substantial portion of the student body. Indeed, it is precisely in a school without such a forum that intolerance for different religious and other views would be most dangerous and that a student who does not share the religious beliefs of his classmates would perceive "that religion or a particular religious belief is favored or preferred."

Wallace v. *Jaffree*, 472 U. S., at 70 (O'CONNOR, J., concurring in judgment).

The plurality concedes that there is a "possibility of *student* peer pressure," *ante*, at 251, but maintains that this does not amount to "official state endorsement." *Ibid.* This dismissal is too facile. We must remain sensitive, especially in the public schools, to "the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others." *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 627–628 (1989) (O'CONNOR, J., concurring in part and concurring in judgment). When the government, through mandatory attendance laws, brings students together in a highly controlled environment every day for the better part of their waking hours and regulates virtually every aspect of their existence during that time, we should not be so quick to dismiss the problem of peer pressure as if the school environment had nothing to do with creating and fostering it. The State has structured an environment in which students holding mainstream views may be able to coerce adherents of minority religions to attend club meetings or to adhere to club beliefs. Thus, the State cannot disclaim its responsibility for those resulting pressures.

II

Given these substantial risks posed by the inclusion of the proposed Christian club within Westside's present forum, Westside must redefine its relationship to its club program. The plurality recognizes that such redefinition is necessary to avoid the risk of endorsement and construes the Act accordingly. The plurality holds that the Act "limits participation by school officials at meetings of student religious groups," *ante*, at 251 (citing §§ 4071(c)(2) and (3)), and requires religion club meetings to be held during noninstructional time, *ibid.* (citing § 4071(b)). It also holds that schools may not sponsor any religious meetings. *Ante*, at 253 (citing § 4072(2)). Fi-

nally, and perhaps most importantly, the plurality states that schools bear the responsibility for taking whatever further steps are necessary to make clear that their recognition of a religious club does not reflect their endorsement of the views of the club's participants. *Ante*, at 251.

Westside thus must do more than merely prohibit faculty members from actively participating in the Christian club's meetings. It must fully disassociate itself from the club's religious speech and avoid appearing to sponsor or endorse the club's goals. It could, for example, entirely discontinue encouraging student participation in clubs and clarify that the clubs are not instrumentally related to the school's overall mission. Or, if the school sought to continue its general endorsement of those student clubs that did not engage in controversial speech, it could do so if it also affirmatively disclaimed any endorsement of the Christian club.

III

The inclusion of the Christian club in the type of forum presently established at Westside, without more, will not assure government neutrality toward religion. Rather, because the school endorses the extracurricular program as part of its educational mission, the inclusion of the Christian club in that program will convey to students the school-sanctioned message that involvement in religion develops "citizenship, wholesome attitudes, good human relations, knowledge and skills." App. 488. We need not question the value of that message to affirm that it is not the place of schools to issue it. Accordingly, schools such as Westside must be responsive not only to the broad terms of the Act's coverage, but also to this Court's mandate that they effectively disassociate themselves from the religious speech that now may become commonplace in their facilities.

JUSTICE STEVENS, dissenting.

The dictionary is a necessary, and sometimes sufficient, aid to the judge confronted with the task of construing an opaque

Act of Congress. In a case like this, however, I believe we must probe more deeply to avoid a patently bizarre result. Can Congress really have intended to issue an order to every public high school in the Nation stating, in substance, that if you sponsor a chess club, a scuba diving club, or a French club—without having formal classes in those subjects—you must also open your doors to every religious, political, or social organization, no matter how controversial or distasteful its views may be? I think not. A fair review of the legislative history of the Equal Access Act (Act), 98 Stat. 1302, 20 U. S. C. §§ 4071–4074, discloses that Congress intended to recognize a much narrower forum than the Court has legislated into existence today.

I

The Act's basic design is easily summarized: when a public high school has a "limited open forum," it must not deny any student group access to that forum on the basis of the religious, political, philosophical, or other content of the speech of the group. Although the consequences of having a limited open forum are thus quite clear, the definition of such a forum is less so. Nevertheless, there is considerable agreement about how this difficulty must be resolved. The Court correctly identifies three useful guides to Congress' intent. First, the text of the statute says that a school creates a limited open forum if it allows meetings on school premises by "noncurriculum related student groups," a concept that is ambiguous at best.[1] *Ante*, at 237. Second, because this concept is ambiguous, the statute must be interpreted by reference to its general purpose, as revealed by its overall structure and by the legislative history. See *ante*, at 238–239. Third, the Act's legislative history reveals that Congress intended to guarantee student religious groups access to high school fora comparable to the college forum involved in

[1] For an extensive discussion of the phrase and its ambiguity, see Laycock, Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers, 81 Nw. U. L. Rev. 1, 36–41 (1986).

Widmar v. *Vincent*, 454 U. S. 263 (1981). *Ante*, at 235, 239. All of this is common ground, shared by the parties and by every Court of Appeals to have construed the Act.[2]

A fourth agreement would seem to follow from these three. If "noncurriculum related" is an ambiguous term, and if it must therefore be interpreted in light of congressional purpose, and if the purpose of Congress was to ensure that the rule of *Widmar* applied to high schools as it did to colleges, then the incidence of the Act in this case should depend upon whether, in light of *Widmar*, Westside would have to permit the Christian student group to meet if Westside were a college.[3] The characteristics of the college forum in *Widmar* should thus provide a useful background for interpreting the meaning of the undefined term "noncurriculum related student groups." But this step the Court does not take, and it is accordingly here that I part company with it.

Our decision in *Widmar* encompassed two constitutional holdings. First, we interpreted the Free Speech Clause of the First Amendment to determine whether the University of Missouri at Kansas City had, by its own policies, abdicated discretion that it would otherwise have to make content-based discriminations among student groups seeking to meet on its campus. We agreed that it had. 454 U. S., at 269; see also *id.*, at 280–281 (STEVENS, J., concurring in judgment). Next, we interpreted the Establishment Clause of the First Amendment to determine whether the university was prohibited from permitting student-initiated religious groups to participate in that forum. We agreed that it was

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[2] Brief for Petitioners 58–59; Brief for Respondents 34–40; Brief for United States as *Amicus Curiae* 17–19, and nn. 21–22 (Act codifies *Widmar*); *id.*, at 22 ("noncurriculum related" is an undefined term); *id.*, at 25 ("noncurriculum related" should be construed by reference to the "larger objectives" of the Act); 867 F. 2d 1076, 1078–1079 (CA8 1989); *Garnett* v. *Renton School Dist. No. 403*, 874 F. 2d 608, 613–614 (CA9 1989).

[3] We would, of course, then have to consider, as the Court does now, whether the Establishment Clause permits Congress to apply *Widmar*'s reasoning to secondary schools.

not. *Id.*, at 270–277; see also, *id.*, at 280–281 (STEVENS, J., concurring in judgment).

To extend *Widmar* to high schools, then, would require us to pose two questions. We would first ask whether a high school had established a forum comparable under our Free Speech Clause jurisprudence to that which existed in *Widmar*. Only if this question were answered affirmatively would we then need to test the constitutionality of the Act by asking whether the Establishment Clause has different consequences when applied to a high school's open forum than when applied to a college's. I believe that in this case the first question must instead be answered in the negative, and that this answer ultimately proves dispositive under the Act just as it would were only constitutional considerations in play.

The forum at Westside is considerably different from that which existed at the University of Missouri. In *Widmar*, we held that the university had created "a generally open forum," *id.*, at 269. Over 100 officially recognized student groups routinely participated in that forum. *Id.*, at 265. They included groups whose activities not only were unrelated to any specific courses, but also were of a kind that a state university could not properly sponsor or endorse. Thus, for example, they included such political organizations as the Young Socialist Alliance, the Women's Union, and the Young Democrats. See *id.*, at 274; *Chess* v. *Widmar*, 635 F. 2d 1310, 1312, and n. 1 (CA8 1980). The university permitted use of its facilities for speakers advocating transcendental meditation and humanism. Since the university had allowed such organizations and speakers the use of campus facilities, we concluded that the university could not discriminate against a religious group on the basis of the content of its speech. The forum established by the state university accommodated participating groups that were "noncurriculum related" not only because they did not mirror the school's classroom instruction, but also because they advocated

controversial positions that a state university's obligation of neutrality prevented it from endorsing.

The Court's opinion in *Widmar* left open the question whether its holding would apply to a public high school that had established a similar public forum. That question has now been answered in the affirmative by the District Court, the Court of Appeals, and by this Court. I agree with that answer. Before the question was answered judicially, Congress decided to answer it legislatively in order to preclude continued unconstitutional discrimination against high school students interested in religious speech. According to Senator Hatfield, a cosponsor of the Act: "All [it] does is merely to try to protect, as I say, a right that is guaranteed under the Constitution that is being denied certain students." 130 Cong. Rec. 19218 (1984). As the Court of Appeals correctly recognized, the Act codified the decision in *Widmar*, "extending that holding to secondary public schools." 867 F. 2d 1076, 1079, and n. 1 (CA8 1989).[4] What the Court of Appeals failed to recognize, however, is the critical difference between the university forum in *Widmar* and the high school forum involved in this case. None of the clubs at the high school are even arguably controversial or partisan.[5]

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[4] The Court of Appeals quoted the following comment by Senator Levin:

"[T]he pending amendment is constitutional in light of the Supreme Court's decision in Widmar against Vincent. This amendment merely extends a similar constitutional rule as enunciated by the Court in Widmar to secondary schools." 130 Cong. Rec. 19236 (1984).

Other Senators agreed. See *id.*, at 19221 (statement of Sen. Leahy); *id.*, at 19237 ("[T]he Court was right in Widmar, and this bill seeks only to clarify and extend the law of that case a bit. . . . What we seek to do by this amendment is make clear that the same rule of law applies to students in our public secondary schools") (statement of Sen. Bumpers); *id.*, at 19239 (statement of Sen. Biden). See also Brief for United States as *Amicus Curiae* 17–19, nn. 21–22 (collecting references to *Widmar* from Senate and House debates).

[5] The Court of Appeals also put too much weight upon the existence of a chess club at Westside. The court quoted an exchange between Senator Gorton and Senator Hatfield in which Senator Hatfield, a cosponsor of the

Nor would it be wise to ignore this difference. High school students may be adult enough to distinguish between those organizations that are sponsored by the school and those which lack school sponsorship even though they participate in a forum that the school does sponsor. See *ante*, at 250. But high school students are also young enough that open fora may be less suitable for them than for college students. The need to decide whether to risk treating students as adults too soon, or alternatively to risk treating them as children too long, is an enduring problem for all educators. The youth of these students, whether described in terms of "impressionability" or "maturity," may be irrelevant to our application of the constitutional restrictions that limit educational discretion in the public schools, but it surely is not irrelevant to our interpretation of the educational policies that have been adopted. We would do no honor to Westside's administrators or the Congress by assuming that either treated casually the differences between high school and college students when formulating the policy and the statute at issue here.[6]

Act, told Senator Gorton that a chess club would be "noncurriculum related" under the Act. 867 F. 2d, at 1078–1079. The exchange is completely inconclusive, however, when read in context. Senator Gorton's questions were designed to show that Senator Hatfield could not offer any satisfactory definition of "noncurriculum related." Senator Gorton's strategy succeeded, and in the course of the exchange Senator "Hatfield offered just about every possible interpretation in less than two columns of the *Congressional Record*." Laycock, 81 Nw. U. L. Rev., at 37. Senator Hatfield eventually conceded that whether a chess club was "noncurriculum related" would depend upon what the school district's lawyers had to say about it. 130 Cong. Rec. 19225 (1984). This Court's majority does not place any special emphasis upon Senator Hatfield's reference to chess clubs, see *ante*, at 245–246 (discussing chess clubs without reference to the legislative history), and I agree that it deserves none.

[6] What I have said before of universities is true *a fortiori* with respect to high schools: A school's extracurricular activities constitute a part of the school's teaching mission, and the school accordingly must make "decisions concerning the content of those activities." *Widmar* v. *Vincent*, 454 U. S.

For these reasons, I believe that the distinctions between Westside's program and the University of Missouri's program suggest what is the best understanding of the Act: An extracurricular student organization is "noncurriculum related" if it has as its purpose (or as part of its purpose) the advocacy of partisan theological, political, or ethical views. A school that admits at least one such club has apparently made the judgment that students are better off if the student community is permitted to, and perhaps even encouraged to, compete along ideological lines. This pedagogical strategy may be defensible or even desirable. But it is wrong to presume that Congress endorsed that strategy—and dictated its nationwide adoption—simply because it approved the application of *Widmar* to high schools. And it seems absurd to presume that Westside has invoked the same strategy by recognizing clubs like the Swimming Timing Team and Subsurfers which, though they may not correspond directly to anything in Westside's course offerings, are no more controversial than a grilled cheese sandwich.

Accordingly, as I would construe the Act, a high school could properly sponsor a French club, a chess club, or a scuba diving club simply because their activities are fully consistent with the school's curricular mission. It would not matter whether formal courses in any of those subjects—or in directly related subjects—were being offered as long as faculty encouragement of student participation in such groups would be consistent with both the school's obligation of neutrality and its legitimate pedagogical concerns. Nothing in *Widmar* implies that the existence of a French club, for example, would create a constitutional obligation to allow student members of the Ku Klux Klan or the Communist Party to

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263, 278 (1981) (STEVENS, J., concurring in judgment). Absent good reason to hold otherwise, these decisions should be left to teachers. *Id.*, at 279, and n. 2. See also *Bethel School Dist. No. 403* v. *Fraser*, 478 U. S. 675, 691, and n. 1 (1986) (STEVENS, J., dissenting).

have access to school facilities.[7] More importantly, nothing in that case suggests that the constitutional issue should turn on whether French is being taught in a formal course while the club is functioning.

Conversely, if a high school decides to allow political groups to use its facilities, it plainly cannot discriminate among controversial groups because it agrees with the positions of some and disagrees with the ideas advocated by others. Again, the fact that the history of the Republican Party might be taught in a political science course could not justify a decision to allow the young Republicans to form a club while denying Communists, white supremacists, or Christian Scientists the same privilege. In my judgment, the political activities of the young Republicans are "noncurriculum related" for reasons that have nothing to do with the content of the political science course. The statutory definition of what is "noncurriculum related" should depend on the constitutional concern that motivated our decision in *Widmar*.

In this case, the District Judge reviewed each of the clubs in the high school program and found that they are all "tied to the educational function of the institution." App. B to Pet. for Cert. 25–26. He correctly concluded that this club system "differs dramatically from those found to create an open forum policy in *Widmar* and *Bender*." *Id.*, at 26.[8] I agree

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[7] Although I recognize that JUSTICE MARSHALL reads *Widmar* more broadly, I respectfully disagree with that reading. Moreover, even if language in *Widmar* supported that reading, the language would be dictum, given the distinction—acknowledged to be critical—between "the wide-open and independent character of the student forum in *Widmar*" and the substantially different character of Westside's program. See *ante*, at 265 (MARSHALL, J., concurring).

[8] In *Bender* v. *Williamsport Area School Dist.*, 563 F. Supp. 697 (MD Pa. 1983), the school officials conceded that any organization conducive to the intellectual or moral growth of students could meet during the activities period. Unlike the school officials in this case, the Williamsport officials had not claimed that the forum was limited on the basis of whether a

with his conclusion that, under a proper interpretation of the Act, this dramatic difference requires a different result.

As I have already indicated, the majority, although it agrees that Congress intended by this Act to endorse the applicaton of *Widmar* to high schools, does not compare this case to *Widmar*. Instead, the Court argues from two other propositions: first, that Congress intended to prohibit discrimination against religious groups; and, second, that the statute must not be construed in a fashion that would allow school boards to circumvent its reach by definitional fiat. I am in complete agreement with both of these principles. I do not, however, believe that either yields the conclusion which the majority adopts.

First, as the majority correctly observes, Congress intended the Act to prohibit schools from excluding—or believing that they were legally obliged to exclude—religious student groups solely because the groups were religious. Congress was clearly concerned with two lines of decisions in the Courts of Appeals: one line prohibiting schools that wished to admit student-initiated religious groups from doing so, see *Lubbock Civil Liberties Union* v. *Lubbock Independent School Dist.*, 669 F. 2d 1038, 1042–1048 (CA5 1982), cert. denied, 459 U. S. 1155 (1983), and a second line allowing schools to exclude religious groups solely because of Establishment Clause concerns, see *Brandon* v. *Guilderland Bd. of Ed.*, 635 F. 2d 971 (CA2 1980), cert. denied, 454 U. S. 1123 (1981); see also *Bender* v. *Williamsport Area School Dist.*, 563 F. Supp. 697 (MD Pa. 1983), rev'd, 741 F. 2d 538 (CA3 1984), vacated on other grounds, 475 U. S. 534 (1986).[9] See *ante*, at 239. These cases, however, involve only schools which either desire to recognize religious student groups, or

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group presented a one-sided view of controversial subjects. *Id.*, at 706–707.

[9] The *Bender* litigation was pending before the Court of Appeals for the Third Circuit when the Act was drafted, and was much discussed by the Act's sponsors.

schools which, like the University of Missouri at Kansas City, purport to exclude religious groups from a forum that is otherwise conceded to be open. It is obvious that Congress need go no further than our *Widmar* decision to redress this problem, and equally obvious that the majority's expansive reading of "noncurriculum related" is irrelevant to the congressional objective of ending discrimination against religious student groups.

Second, the majority is surely correct that a "'limited open forum should be triggered by what a school does, not by what it says.'" *Ante*, at 244, quoting 130 Cong. Rec. 19222 (1984) (statement of Sen. Leahy). If, however, it is the recognition of advocacy groups that signals the creation of such a forum, I see no danger that school administrators will be able to manipulate the Act to defeat Congressional intent.[10] Indeed, it seems to me that it is the majority's own test that is suspect on this score.[11] It would appear that the school could alter the "noncurriculum related" status of Subsurfers, see *ante*, at 245, simply by, for example, including one day of scuba instruction in its swimming classes, or by requiring

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[10] Since the statute as I construe it would track our own Free Speech Clause jurisprudence, administrators could no more escape the Act's restrictions by mere labeling than they could escape the First Amendment itself by such means.

[11] According to the Court:

"In our view, a student group directly relates to a school's curriculum if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit." *Ante*, at 239–240.

The Court clarifies the meaning of the second part of this test by suggesting that "[a] school's student government would generally relate directly to the curriculum to the extent that it addresses concerns, solicits opinions, and formulates proposals pertaining to the body of courses offered by the school." *Ante*, at 240. Likewise, the fact that the International Club is "'developed through our foreign language classes'" suffices to satisfy the Court's test, presumably as a result of its first prong. See *ante*, at 246.

physical education teachers to urge student participation in the club, or even by soliciting regular comments from the club about how the school could better accommodate the club's interest within coursework.[12] This may be what the school does rather than what it says, but the "doing" is mere bureaucratic procedure unrelated to the substance of the forum or the speech it encompasses.

Not only is the Court's preferred construction subject to manipulation, but it also is exceptionally difficult to apply even in the absence of deliberate evasion. For example, the Court believes that Westside's swim team is "directly related" to the curriculum, but the scuba diving club is not. *Ibid.* The Court's analysis makes every high school football program a borderline case, for while many schools teach football in physical education classes, they usually teach touch football or flag football, and the varsity team usually plays tackle football. Tackle football involves more equipment and greater risk, and so arguably stands in the same relation to touch football as scuba diving does to swimming. Likewise, it would appear that high school administrators might reasonably have difficulty figuring out whether a cheerleading squad or pep club might trigger the Act's application. The answer, I suppose, might depend upon how strongly students were encouraged to support the football team. Obviously, every test will produce some hard cases,[13] but the Court's test seems to produce nothing but hard cases.

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[12] The club's membership might have a special interest in seeing more attention devoted to ichthyological topics in biology classes, in adding oceanographic examples to physics classes, and in allowing advanced students in the school shops to design snorkeling gear. As I understand the majority's test, Subsurfers would not be "noncurriculum related" so long as the club made such suggestions as these on a regular basis, even if the Westside administration regularly thanked the club and rejected every suggestion it made. See *ante*, at 240 (discussing the student government).

[13] Under my reading of the statute, for example, a difficult case might be posed if a district court were forced to decide whether a high school's Nietzsche Club were concerned with philology or doctrine. None of the

For all of these reasons, the argument for construing "noncurriculum related" by recourse to the facts of *Widmar*, and so by reference to the existence of advocacy groups, seems to me overwhelming. It provides a test that is both more simple and more easily administered than what the majority has crafted. Indeed, the only plausible answer to this construction of the statute is that it could easily be achieved without reference to the exotic concept of "noncurriculum related" organizations. This point was made at length on the Senate floor by Senator Gorton.[14] Senator Hatfield answered that the term had been recommended to him by lawyers, apparently in an effort to capture the distinctions important to the judiciary's construction of the Free Speech Clause.[15]

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very common clubs at Westside, however, causes any difficulties for this test, while nearly all of them present close questions if examined pursuant to the Court's rubric. The Nietzsche Club is a problem that can be dealt with when it actually arises.

[14] Senator Gorton proposed replacing the Act with another, which read: "No public secondary school receiving Federal financial assistance shall prohibit the use of school facilities for meetings during noninstructional time by voluntary student groups solely on the basis that some or all of the speech engaged in by members of such groups during their meetings is or will be religious in nature." 130 Cong. Rec. 19225 (1984).

[15] Senator Hatfield attributed the Act's complex terminology to "too many lawyers wanting to put something down to satisfy one particular legal point of view, one legal school, or one precedent, or one court decision, or one experience." *Ibid.*

In light of this admission and similar statements, it is astonishing that the United States asks us to believe that Congress, by using the phrase "noncurriculum related," intended to reject *Widmar*'s definition of an "open forum" in favor of a definition that would be "highly specific" and less confusing. See Brief for United States as *Amicus Curiae* 20–21. I am instead inclined to agree with Professor Laycock, who observes that "[a] House opponent [of the Act] was surely correct when he said that not even the sponsors of the bill knew what it meant." Laycock, 81 Nw. U. L. Rev., at 38. The bill's supporters admitted that its language was murky, but suggested that something was better than nothing. See 130 Cong. Rec. 20946 (statement of Rep. Hyde). If Congress really intended to de-

Congress may sometimes, however, have a clear intent with respect to the whole of a statute even when it muddles the definition of a particular part, just as, in other cases, the intent behind a particular provision may be clear though the more comprehensive purpose of the statute is obscure. In this case, Congress' general intent is—as Senator Gorton certainly understood—a necessary guide to the Act's more particular terms. In answer to this strategy, the Court points out that references to *Widmar* must be considered in context. *Ante*, at 242–243. That is surely so. But when this is done it becomes immediately clear that those references are neither "few" nor "passing" nor even "general," *ante*, at 242; they are instead the sheet anchors holding fast a debate that would otherwise be swept away in a gale of confused utterances.[16]

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part from *Widmar* for reasons of administrative clarity, Congress kept its intent well hidden, both in the statute and in the debates preceding its passage.

[16] The Court makes a gallant, and commendable, effort to vindicate Congress' peculiar diction. But I fear that in the end the Court's dogged persistence leads it to miss the forest for the trees. The Court quite properly points out that Congress' general intent cannot be established by a single reference, or even several statements, sundered from context. One can, of course, no more deduce the meaning of legislative history by quoting one randomly chosen Senator than one can capture the meaning of a play by quoting one randomly chosen character. To say that Polonius, Claudius, and Gertrude express differing views about Hamlet's "antic disposition" is not to say that *Hamlet* has no meaning. No reader of the congressional drama in this case can come away unimpressed by its focus upon *Widmar:* The congressional actors quite clearly agreed that *Widmar*'s rule should be extended to high schools, but were confused about how to draft a statute that did so. Nothing quoted by the Court so much as hints at a contrary reading.

The Court's discussion of Senator Levin's speech, *ante*, at 243, is especially puzzling. The Court says that this dissent "plac[es] great reliance on a comment by Senator Levin." *Ibid.* In fact, Senator Levin's remark is 1 among 4 specific citations in a single footnote, and is further buttressed by the more than 20 additional citations collected in the brief of the United States as *amicus curiae*. See n. 4, *supra*. The footnote singles out Sen-

We might wish, along with Senator Gorton, that Congress had chosen a better term to effectuate its purposes. But our own efforts to articulate "public forum" analysis have not, in my opinion, been altogether satisfactory. See *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 833 (1985) (STEVENS, J., dissenting).[17] Lawyers and legislators seeking to capture our distinctions in legislative terminology should be forgiven if they occasionally stumble.[18] Certainly

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ator Levin for special attention not because his views are of unique importance, but because his remarks were quoted by the Court of Appeals. *Ibid.* Still odder is the Court's own use of Senator Levin. The Court quotes the Senator as saying, "The pending amendment will allow students equal access to secondary schools student-initiated religious meetings before and after school where the school generally allows groups of secondary school students to meet during those times." 130 Cong. Rec. 19236 (1984). The Court emphasizes the word "generally." This word, however, puts Senator Levin in square opposition to the Court's reading of the Act. I agree with the Senator that the Act authorizes meetings by religious student-initiated groups in schools that permit meetings by student groups in general; the Court, however, must show that the Act authorizes such meetings even in schools that have a less generally open forum, one defined specifically enough to exclude partisan ideological organizations. Senator Levin's statement does not help the Court.

Nor can the Court claim any assistance from the reservations expressed by Senators Chiles and Denton about the legislative history, *ante*, at 243: When their remarks are considered in context, it becomes immediately apparent that both men were addressing specific problems completely unrelated to the Act's connection with *Widmar*.

[17] See also Farber & Nowak, The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication, 70 Va. L. Rev. 1219, 1223–1225 (1984); L. Tribe, American Constitutional Law § 12–24 (2d ed. 1988).

[18] The Court would have us believe that the step is not a stumble but a pirouette: The Court declares that any possible interpretation of the Act must concede that Congress intended to draw a subtle distinction between a "limited public forum" and a "limited open forum." *Ante*, at 242. For the reasons given in n. 15, *supra*, I find this suggestion implausible: The drafting of this legislation was not so finely choreographed.

Moreover, this Court's own opinion in *Widmar* refers, in quick succession and without apparent distinction, to "a forum generally open to the

we should not hold Congress to a standard of precision we ourselves are sometimes unable to obtain. "Our duty is to ask what Congress intended, and not to assay whether Congress might have stated that intent more naturally, more artfully, or more pithily." *Sullivan* v. *Everhart*, 494 U. S. 83, 106 (1990) (STEVENS, J., dissenting).

II

My construction of the Act makes it unnecessary to reach the Establishment Clause question that the plurality decides.[19] It is nevertheless appropriate to point out that the question is much more difficult than the plurality assumes.[20]

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public," 454 U. S., at 268; "a generally open forum," *id.*, at 269; and "a public forum," *id.*, at 270. The District Court opinion in *Bender*—an opinion of great concern to Congress when it passed this Act—observed that "a university which accommodates student organizations by making its facilities 'generally open' for their meetings will have created a 'limited' public forum." 563 F. Supp., at 705. In the same month the Act was passed, the Court of Appeals' opinion in *Bender* closed the circle by using "limited open forum" to describe the First Amendment status of both the college forum in *Widmar* and the high school forum in *Bender*. *Bender* v. *Williamsport Area School Dist.*, 741 F. 2d 538, 547, n. 12 (CA3 1984); *id.*, at 550. It would be wrong to say that the Court today slices these distinctions too thin: There is in fact no distinction for the slicing.

Even were I to accept the Court's premise, however, it would not lead me to the Court's conclusion. It does not seem that a "limited open forum" would be, as the Court must suppose, *narrower* in scope than a "limited public forum." Dictionary definitions, which the Court seems to favor, point in the opposite direction.

[19] We consider Establishment Clause questions under the three-part analysis set forth in *Lemon* v. *Kurtzman*, 403 U. S. 602, 612–613 (1971): "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . . ; finally, the statute must not foster 'an excessive government entanglement with religion.'" (Citations omitted.)

[20] The difficulty of the constitutional question compounds the problems with the Court's treatment of the statutory issue. In light of the ambiguity which it concedes to exist in both the statutory text and the legislative history, the Court has an obligation to adopt an equally reasonable con-

The plurality focuses upon whether the Act might run afoul of the Establishment Clause because of the danger that some students will mistakenly believe that the student-intiated religious clubs are sponsored by the school.[21] I believe that the

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struction of the Act that will avoid the constitutional issue. Cf. *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490, 500 (1979).

[21] The plurality also considers briefly, and then rejects, the possibility that the Act may lack the "secular purpose" required by the Establishment Clause. See *ante*, at 248–249. In my view, that question, too, is closer than the plurality suggests. There is no doubt that the purpose of this Act is to facilitate meetings by religious student organizations at public high schools. See, *e. g.*, 130 Cong. Rec. 19216 (1984) (statement of Sen. Denton). There would nevertheless be no problem with the Act if it did no more than redress discrimination against religion. See *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327, 338 (1987) (characterizing as "proper" the statutory "purpose of lifting a regulation that burdens the exercise of religion," even if the resulting exemption does not "come packaged with benefits to secular entities"). Under the Court's reading of the Act, however, Congress had a considerably more expansive purpose: that of authorizing religious groups to meet even in schools that prohibit assembly of all partisan organizations and thus do not single out religious groups in particular. The Act also authorizes meetings of political or philosophic as well as religious groups, but it is clear that Congress was principally interested in religious speech. *Ante*, at 239. The application of *Lemon*'s secular purpose requirement to the Act thus becomes more complicated.

When examining this issue, the plurality quite properly recognizes that we must distinguish between religious *motives* and religious *purposes*. See *ante*, at 249. The plurality, however, misapplies the distinction. If a particular legislator were to vote for a bill on the basis of a personal, religious belief that free speech is a good thing, the legislator would have a religious motive. That motive would present no problem under the Establishment Clause. If, however, the legislator were to vote for the bill on the basis of a prediction that the resulting speech would be religious in character, then the legislator would have a religious purpose. That would present a problem under the Establishment Clause. It is, moreover, entirely possible that this religious purpose might exist even absent a religious motive, as would be the case if the legislator's only reason for favoring religious speech was a belief that it would tend to produce cooperative behavior and so reduce the crime rate. It is the latter, not the former, kind of religious intention that is at issue here. As such, the plurality's

plurality's construction of the statute obliges it to answer a further question: whether the Act violates the Establishment Clause by authorizing religious organizations to meet on high school grounds even when the high school's teachers and administrators deem it unwise to admit controversial or partisan organizations of any kind.

Under the plurality's interpretation of the Act, Congress has imposed a difficult choice on public high schools receiving federal financial assistance. If such a school continues to allow students to participate in such familiar and innocuous activities as a school chess or scuba diving club, it must also allow religious groups to make use of school facilities. In-

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analysis of *Lemon*'s purpose requirement presupposes that having a religious *purpose* for enacting a statute becomes analogous to having a religious *motive* for enacting the statute whenever the statute confers some incidental benefit upon secular activity. With this I cannot agree.

To survive scrutiny under the *Lemon* test, it is not enough that a statute's sponsors identify some secular goals allegedly served by the Act. We have held that a statute is unconstitutional if it "does not have a clearly secular purpose," *Wallace* v. *Jaffree*, 472 U. S. 38, 56 (1985), or if its "primary purpose was to . . . provide persuasive advantage to a particular religious doctrine." *Edwards* v. *Aguillard*, 482 U. S. 578, 592 (1987). A law requiring that the Ten Commandments be posted in school classrooms is not vindicated by the possibility that reading it would teach students about a "fundamental legal code," *Stone* v. *Graham*, 449 U. S. 39, 41 (1980), and a law requiring recitation of the Lord's Prayer is likewise not saved by assertions—true or not—that such a practice serves the "promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature." *Abington School Dist.* v. *Schempp*, 374 U. S. 203, 223 (1963).

In sum, the crucial question, under the purpose requirement of the *Lemon* test, is whether the challenged statute reflects a judgment that it would be desirable for people to be religious or to adhere to a particular religion. The plurality is correct to observe that it is irrelevant whether the legislature itself behaved religiously when it made (or abstained from making) that judgment. The plurality's observation, however, is likewise irrelevant to the question before us. The Act may nevertheless comply with the purpose requirement of the *Lemon* test by encompassing political and philosophic as well as religious speech, but that conclusion requires more explanation than the Court provides.

deed, it is hard to see how a cheerleading squad or a pep club, among the most common student groups in American high schools, could avoid being "noncurriculum related" under the majority's test. The Act, as construed by the majority, comes perilously close to an outright command to allow organized prayer, and perhaps the kind of religious ceremonies involved in *Widmar*, on school premises.

We have always treated with special sensitivity the Establishment Clause problems that result when religious observances are moved into the public schools. *Edwards* v. *Aguillard*, 482 U. S. 578, 583–584 (1987). "The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools . . . ." *Illinois ex rel. McCollum* v. *Board of Ed. of School Dist. No. 71, Champaign County*, 333 U. S. 203, 231 (1948) (Frankfurter, J., concurring). As the plurality recognizes, *ante*, at 251, student-initiated religious groups may exert a considerable degree of pressure even without official school sponsorship. "The law of imitation operates, and nonconformity is not an outstanding characteristic of children." *McCollum*, 333 U. S., at 227 (Frankfurter, J., concurring); see also *Abington School Dist.* v. *Schempp*, 374 U. S. 203, 290–291 (1963) (BRENNAN, J., concurring). Testimony in this case indicated that one purpose of the proposed Bible Club was to convert students to Christianity. App. 185. The influence that could result is the product not only of the Act and student-initiated speech, but also of the compulsory attendance laws, which we have long recognized to be of special constitutional importance in this context. *Id.*, at 252–253; *Wallace* v. *Jaffree*, 472 U. S. 38, 60, n. 51 (1985). Moreover, the speech allowed is not simply the individual expression of personal conscience, as was the case in *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503 (1969), or *West Virginia State Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943), but is instead the collective statement of an organiza-

tion—a "student club," with powers and responsibilities defined by that status—that would not exist absent the State's intervention.[22]

I tend to agree with the plurality that the Constitution does not forbid a local school district, or Congress, to bring organized religion into the schools so long as all groups, religious or not, are welcomed equally if "they do not break either the laws or the furniture."[23] That Congress has such authority, however, does not mean that the concerns underlying the Establishment Clause are irrelevant when, and if, that authority is exercised.[24] Certainly we should not rush to embrace the conclusion that Congress swept aside these concerns by the hurried passage of clumsily drafted legislation.[25]

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[22] Respondents have sought not merely access to school meeting rooms, but also "the same rights, privileges, terms and conditions accorded to other clubs" at Westside. Brief for Respondents 1, and n. 2. In this respect, at least, this case resembles *Hazelwood School Dist.* v. *Kuhlmeier*, 484 U. S. 260 (1988), more than it does *Tinker* v. *Des Moines Independent Community School Dist.* Cf. Stewart, The First Amendment, The Public Schools, and the Inculcation of Community Values, 18 J. Law & Ed. 23, 36 (1989) (stressing distinction between "cases . . . in which students seek only to prevent state interference with their communicative activities, and cases . . . in which students seek active assistance in the dissemination of their ideas").

[23] The quotation is from Congressman Frank, who spoke in support of the bill on the House floor. 130 Cong. Rec. 20933 (1984).

[24] The bill enjoyed "wide, bipartisan" support in both Houses, *ante*, at 239, but it likewise provoked thoughtful, bipartisan opposition in each body. Senator Chafee was among those who opposed the bill; he warned his colleagues that passing it might secure religious access to the schools only at the price of educational quality: "Legislation to encourage religious and political activity in the schools will do little to resolve our problems in education but could lead to discord between those whose cooperation in the drive for excellence in education is more important than ever." 130 Cong. Rec. 19248 (1984).

[25] Professor Laycock summarizes the circumstances of the Act's passage as follows:

There is an additional reason, also grounded in constitutional structure, why the Court's rendering of the Act is unsatisfying: So construed, the Act alters considerably the balance between state and federal authority over education, a balance long respected by both Congress and this Court. See, *e. g.*, *Board of Education, Island Trees Union Free School Dist. No. 26* v. *Pico*, 457 U. S. 853, 863–864 (1982). The traditional allocation of responsibility makes sense for pedagogical, political, and ethical reasons.[26] We have, of course, sometimes found it necessary to limit local control over schools in order to protect the constitutional integrity of public education. "That [boards of education] are educating

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"The bill was completely rewritten in a series of multilateral negotiations after it was passed by the House and reported out of committee in the Senate. Thus, the committee reports cast no light on the language actually adopted. Senator Hatfield offered the negotiated compromise as a floor amendment in the midst of the Senate's rush to adjourn for the Fourth of July. He repeatedly emphasized that as many as 1,000 people had been involved in the negotiations that produced the compromise version, and that not all the senators sponsoring the compromise agreed with everything in it. Senator Gorton accurately observed that too many cooks had spoiled the broth. But Hatfield had a large majority committed to his compromise, and he resisted any change that might have caused the deal to fall apart. The Hatfield compromise later passed the House under a special rule that precluded amendments and limited debate to one hour." 81 Nw. U. L. Rev., at 37 (footnotes omitted).

[26] As a matter of pedagogy, delicate decisions about immersing young students in ideological cross-currents ought to be made by educators familiar with the experience and needs of the particular children affected and with the culture of the community in which they are likely to live as adults. See *Hazelwood School Dist.* v. *Kuhlmeier*, 484 U. S., at 271–272. As a matter of politics, public schools are often dependent for financial support upon local communities. The schools may be better able to retain local favor if they are free to shape their policies in response to local preferences. See *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 49–53 (1973). As a matter of ethics, it is sensible to respect the desire of parents to guide the education of their children without surrendering control to distant politicians. See *Meyer* v. *Nebraska*, 262 U. S. 390, 399–403 (1923).

the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S., at 637; see also *Brown* v. *Board of Education*, 347 U. S. 483 (1954); *Missouri* v. *Jenkins*, 495 U. S. 33 (1990). Congress may make similar judgments, and has sometimes done so, finding it necessary to regulate public education in order to achieve important national goals.

The Court's construction of this Act, however, leads to a sweeping intrusion by the Federal Government into the operation of our public schools, and does so despite the absence of any indication that Congress intended to divest local school districts of their power to shape the educational environment. If a high school administration continues to believe that it is sound policy to exclude controversial groups, such as political clubs, the Ku Klux Klan, and perhaps gay rights advocacy groups, from its facilities, it now must also close its doors to traditional extracurricular activities that are noncontroversial but not directly related to any course being offered at the school. Congress made frequent reference to the primacy of local control in public education, and the legislative history of the Act is thus inconsistent with the Court's rigid definition of "noncurriculum related groups."[27] In-

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[27] See, *e. g.*, 130 Cong. Rec. 19217 (1984) ("I am fully committed to the proposition that schools and education in general must be under the guidance and control of local school districts, local school boards, State school boards, and so forth. But where there is an action that is taken by such an official body, representing the public schools, which denies a right that is guaranteed under the Constitution, then the Congress of the United States, I think, has a duty and an obligation to step in and remedy that violated right") (statement of Sen. Hatfield). The Court does not suggest that Westside has deprived its students of any constitutionally guaranteed rights in this case. See also *id.*, at 20941 ("The bill only applies if the school voluntarily creates a limited open forum. Everything is left to the

deed, the very fact that Congress omitted any definition in the statute itself is persuasive evidence of an intent to allow local officials broad discretion in deciding whether or not to create limited public fora. I see no reason—and no evidence of congressional intent—to constrain that discretion any more narrowly than our holding in *Widmar* requires.

III

Against all these arguments the Court interposes Noah Webster's famous dictionary. It is a massive tome but no match for the weight the Court would put upon it. The Court relies heavily on the dictionary's definition of "curriculum." See *ante*, at 237. That word, of course, is not the Act's; moreover, the word "noncurriculum" is not in the dictionary. Neither Webster nor Congress has authorized us to assume that "noncurriculum" is a precise antonym of the word "curriculum." "Nonplus," for example, does not mean "minus" and it would be incorrect to assume that a "nonentity" is not an "entity" at all. Purely as a matter of defining a newly coined word, the term "noncurriculum" could fairly be construed to describe either the subjects that are "not a part of the current curriculum" or the subjects that "cannot properly be included in a public school curriculum." Either of those definitions is perfectly "sensible" because both describe subjects "that are not related to the body of courses offered by the school." See *ante*, at 237. When one considers the basic purpose of the Act, and its unquestioned linkage to our decision in *Widmar*, the latter definition surely is the more "sensible."

I respectfully dissent.

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local option. Everything is left to the local administrators and the local school board") (statement of Rep. Goodling).

ILLINOIS *v.* PERKINS

CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIFTH JUDICIAL DISTRICT

No. 88–1972. Argued February 20, 1990—Decided June 4, 1990

Police placed undercover agent Parisi in a jail cellblock with respondent Perkins, who was incarcerated on charges unrelated to the murder that Parisi was investigating. When Parisi asked him if he had ever killed anybody, Perkins made statements implicating himself in the murder. He was then charged with the murder. The trial court granted respondent's motion to suppress his statements on the ground that Parisi had not given him the warnings required by *Miranda* v. *Arizona*, 384 U. S. 436, before their conversations. The Appellate Court of Illinois affirmed, holding that *Miranda* prohibits all undercover contacts with incarcerated suspects that are reasonably likely to elicit an incriminating response.

Held: An undercover law enforcement officer posing as a fellow inmate need not give *Miranda* warnings to an incarcerated suspect before asking questions that may elicit an incriminating response. The *Miranda* doctrine must be enforced strictly, but only in situations where the concerns underlying that decision are present. Those concerns are not implicated here, since the essential ingredients of a "police-dominated atmosphere" and compulsion are lacking. It is *Miranda*'s premise that the danger of coercion results from the interaction of custody and official interrogation, whereby the suspect may feel compelled to speak by the fear of reprisal for remaining silent or in the hope of more lenient treatment should he confess. That coercive atmosphere is not present when an incarcerated person speaks freely to someone whom he believes to be a fellow inmate and whom he assumes is not an officer having official power over him. In such circumstances, *Miranda* does not forbid mere strategic deception by taking advantage of a suspect's misplaced trust. The only difference between this case and *Hoffa* v. *United States*, 385 U. S. 293—which upheld the placing of an undercover agent near a suspect in order to gather incriminating information—is that Perkins was incarcerated. Detention, however, whether or not for the crime in question, does not warrant a presumption that such use of an undercover agent renders involuntary the incarcerated suspect's resulting confession. *Mathis* v. *United States*, 391 U. S. 1—which held that an inmate's statements to a known agent were inadmissible because no *Miranda* warnings were given—is distinguishable. Where the suspect does not

know that he is speaking to a government agent, there is no reason to assume the possibility of coercion. *Massiah* v. *United States*, 377 U. S. 201, and similar cases—which held that the government may not use an undercover agent to circumvent the Sixth Amendment right to counsel once a suspect has been charged—are inapplicable, since, here, no murder charges had been filed at the time of the interrogation. Also unavailing is Perkins' argument that a bright-line rule for the application of *Miranda* is desirable, since law enforcement officers will have little difficulty applying the holding of this case. Pp. 296–300.

176 Ill. App. 3d 443, 531 N. E. 2d 141, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, STEVENS, O'CONNOR, and SCALIA, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, *post*, p. 300. MARSHALL, J., filed a dissenting opinion, *post*, p. 303.

Marcia L. Friedl, Assistant Attorney General of Illinois, argued the cause for petitioner. With her on the briefs were *Neil F. Hartigan*, Attorney General, *Robert J. Ruiz*, Solicitor General, and *Terence M. Madsen* and *Jack Donatelli*, Assistant Attorneys General.

Paul J. Larkin, Jr., argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Dennis*, and *Deputy Solicitor General Bryson*.

Dan W. Evers, by appointment of the Court, 493 U. S. 930, argued the cause for respondent. With him on the brief was *Daniel M. Kirwan*.*

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*Briefs of *amici curiae* urging reversal were filed for Americans for Effective Law Enforcement, Inc., et al. by *Gregory U. Evans*, *Daniel B. Hales*, *George D. Webster*, *Jack E. Yelverton*, *Fred E. Inbau*, *Wayne W. Schmidt*, *Bernard J. Farber*, and *James P. Manak*; and for the Lincoln Legal Foundation et al. by *Joseph A. Morris*, *Donald D. Bernardi*, *Fred L. Foreman*, *Daniel M. Harrod*, and *Jack E. Yelverton*.

John A. Powell, *William B. Rubenstein*, and *Harvey Grossman* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

JUSTICE KENNEDY delivered the opinion of the Court.

An undercover government agent was placed in the cell of respondent Perkins, who was incarcerated on charges unrelated to the subject of the agent's investigation. Respondent made statements that implicated him in the crime that the agent sought to solve. Respondent claims that the statements should be inadmissible because he had not been given *Miranda* warnings by the agent. We hold that the statements are admissible. *Miranda* warnings are not required when the suspect is unaware that he is speaking to a law enforcement officer and gives a voluntary statement.

I

In November 1984, Richard Stephenson was murdered in a suburb of East St. Louis, Illinois. The murder remained unsolved until March 1986, when one Donald Charlton told police that he had learned about a homicide from a fellow inmate at the Graham Correctional Facility, where Charlton had been serving a sentence for burglary. The fellow inmate was Lloyd Perkins, who is the respondent here. Charlton told police that, while at Graham, he had befriended respondent, who told him in detail about a murder that respondent had committed in East St. Louis. On hearing Charlton's account, the police recognized details of the Stephenson murder that were not well known, and so they treated Charlton's story as a credible one.

By the time the police heard Charlton's account, respondent had been released from Graham, but police traced him to a jail in Montgomery County, Illinois, where he was being held pending trial on a charge of aggravated battery, unrelated to the Stephenson murder. The police wanted to investigate further respondent's connection to the Stephenson murder, but feared that the use of an eavesdropping device would prove impracticable and unsafe. They decided instead to place an undercover agent in the cellblock with respondent and Charlton. The plan was for Charlton and un-

dercover agent John Parisi to pose as escapees from a work release program who had been arrested in the course of a burglary. Parisi and Charlton were instructed to engage respondent in casual conversation and report anything he said about the Stephenson murder.

Parisi, using the alias "Vito Bianco," and Charlton, both clothed in jail garb, were placed in the cellblock with respondent at the Montgomery County jail. The cellblock consisted of 12 separate cells that opened onto a common room. Respondent greeted Charlton who, after a brief conversation with respondent, introduced Parisi by his alias. Parisi told respondent that he "wasn't going to do any more time" and suggested that the three of them escape. Respondent replied that the Montgomery County jail was "rinky-dink" and that they could "break out." The trio met in respondent's cell later that evening, after the other inmates were asleep, to refine their plan. Respondent said that his girlfriend could smuggle in a pistol. Charlton said: "Hey, I'm not a murderer, I'm a burglar. That's your guys' profession." After telling Charlton that he would be responsible for any murder that occurred, Parisi asked respondent if he had ever "done" anybody. Respondent said that he had and proceeded to describe at length the events of the Stephenson murder. Parisi and respondent then engaged in some casual conversation before respondent went to sleep. Parisi did not give respondent *Miranda* warnings before the conversations.

Respondent was charged with the Stephenson murder. Before trial, he moved to suppress the statements made to Parisi in the jail. The trial court granted the motion to suppress, and the State appealed. The Appellate Court of Illinois affirmed, 176 Ill. App. 3d 443, 531 N. E. 2d 141 (1988), holding that *Miranda* v. *Arizona*, 384 U. S. 436 (1966), prohibits all undercover contacts with incarcerated suspects that are reasonably likely to elicit an incriminating response.

We granted certiorari, 493 U. S. 808 (1989), to decide whether an undercover law enforcement officer must give

Miranda warnings to an incarcerated suspect before asking him questions that may elicit an incriminating response. We now reverse.

II

In *Miranda* v. *Arizona*, *supra*, the Court held that the Fifth Amendment privilege against self-incrimination prohibits admitting statements given by a suspect during "custodial interrogation" without a prior warning. Custodial interrogation means "questioning initiated by law enforcement officers after a person has been taken into custody . . . ." *Id.*, at 444. The warning mandated by *Miranda* was meant to preserve the privilege during "incommunicado interrogation of individuals in a police-dominated atmosphere." *Id.*, at 445. That atmosphere is said to generate "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.*, at 467. "Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated." *Berkemer* v. *McCarty*, 468 U. S. 420, 437 (1984).

Conversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*. The essential ingredients of a "police-dominated atmosphere" and compulsion are not present when an incarcerated person speaks freely to someone whom he believes to be a fellow inmate. Coercion is determined from the perspective of the suspect. *Rhode Island* v. *Innis*, 446 U. S. 291, 301 (1980); *Berkemer* v. *McCarty*, *supra*, at 442. When a suspect considers himself in the company of cellmates and not officers, the coercive atmosphere is lacking. *Miranda*, 384 U. S., at 449 ("[T]he 'principal psychological factor contributing to a successful interrogation is *privacy*—being alone with the person under interrogation'"); *id.*, at 445. There is no empirical basis for the assumption that a suspect speaking to those whom he assumes are not officers will feel compelled to speak by the fear

of reprisal for remaining silent or in the hope of more lenient treatment should he confess.

It is the premise of *Miranda* that the danger of coercion results from the interaction of custody and official interrogation. We reject the argument that *Miranda* warnings are required whenever a suspect is in custody in a technical sense and converses with someone who happens to be a government agent. Questioning by captors, who appear to control the suspect's fate, may create mutually reinforcing pressures that the Court has assumed will weaken the suspect's will, but where a suspect does not know that he is conversing with a government agent, these pressures do not exist. The state court here mistakenly assumed that because the suspect was in custody, no undercover questioning could take place. When the suspect has no reason to think that the listeners have official power over him, it should not be assumed that his words are motivated by the reaction he expects from his listeners. "[W]hen the agent carries neither badge nor gun and wears not 'police blue,' but the same prison gray" as the suspect, there is no "*interplay* between police interrogation and police custody." Kamisar, *Brewer v. Williams, Massiah* and *Miranda:* What is "Interrogation"? When Does it Matter?, 67 Geo. L. J. 1, 67, 63 (1978).

Miranda forbids coercion, not mere strategic deception by taking advantage of a suspect's misplaced trust in one he supposes to be a fellow prisoner. As we recognized in *Miranda:* "Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." 384 U. S., at 478. Ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda*'s concerns. Cf. *Oregon* v. *Mathiason*, 429 U. S. 492, 495–496 (1977) *(per curiam); Moran* v. *Burbine*, 475 U. S. 412 (1986) (where police fail to inform suspect of attorney's efforts to reach him,

neither *Miranda* nor the Fifth Amendment requires suppression of prearraignment confession after voluntary waiver).

Miranda was not meant to protect suspects from boasting about their criminal activities in front of persons whom they believe to be their cellmates. This case is illustrative. Respondent had no reason to feel that undercover agent Parisi had any legal authority to force him to answer questions or that Parisi could affect respondent's future treatment. Respondent viewed the cellmate-agent as an equal and showed no hint of being intimidated by the atmosphere of the jail. In recounting the details of the Stephenson murder, respondent was motivated solely by the desire to impress his fellow inmates. He spoke at his own peril.

The tactic employed here to elicit a voluntary confession from a suspect does not violate the Self-Incrimination Clause. We held in *Hoffa* v. *United States*, 385 U. S. 293 (1966), that placing an undercover agent near a suspect in order to gather incriminating information was permissible under the Fifth Amendment. In *Hoffa*, while petitioner Hoffa was on trial, he met often with one Partin, who, unbeknownst to Hoffa, was cooperating with law enforcement officials. Partin reported to officials that Hoffa had divulged his attempts to bribe jury members. We approved using Hoffa's statements at his subsequent trial for jury tampering, on the rationale that "no claim ha[d] been or could [have been] made that [Hoffa's] incriminating statements were the product of any sort of coercion, legal or factual." *Id.*, at 304. In addition, we found that the fact that Partin had fooled Hoffa into thinking that Partin was a sympathetic colleague did not affect the voluntariness of the statements. *Ibid.* Cf. *Oregon* v. *Mathiason*, *supra*, at 495–496 (officer's falsely telling suspect that suspect's fingerprints had been found at crime scene did not render interview "custodial" under *Miranda*); *Frazier* v. *Cupp*, 394 U. S. 731, 739 (1969); *Procunier* v. *Atchley*, 400 U. S. 446, 453–454 (1971). The only difference between this case and *Hoffa* is that the suspect here was incarcerated, but

detention, whether or not for the crime in question, does not warrant a presumption that the use of an undercover agent to speak with an incarcerated suspect makes any confession thus obtained involuntary.

Our decision in *Mathis* v. *United States*, 391 U. S. 1 (1968), is distinguishable. In *Mathis*, an inmate in a state prison was interviewed by an Internal Revenue Service agent about possible tax violations. No *Miranda* warning was given before questioning. The Court held that the suspect's incriminating statements were not admissible at his subsequent trial on tax fraud charges. The suspect in *Mathis* was aware that the agent was a Government official, investigating the possibility of noncompliance with the tax laws. The case before us now is different. Where the suspect does not know that he is speaking to a government agent there is no reason to assume the possibility that the suspect might feel coerced. (The bare fact of custody may not in every instance require a warning even when the suspect is aware that he is speaking to an official, but we do not have occasion to explore that issue here.)

This Court's Sixth Amendment decisions in *Massiah* v. *United States*, 377 U. S. 201 (1964), *United States* v. *Henry*, 447 U. S. 264 (1980), and *Maine* v. *Moulton*, 474 U. S. 159 (1985), also do not avail respondent. We held in those cases that the government may not use an undercover agent to circumvent the Sixth Amendment right to counsel once a suspect has been charged with the crime. After charges have been filed, the Sixth Amendment prevents the government from interfering with the accused's right to counsel. *Moulton*, *supra*, at 176. In the instant case no charges had been filed on the subject of the interrogation, and our Sixth Amendment precedents are not applicable.

Respondent can seek no help from his argument that a bright-line rule for the application of *Miranda* is desirable. Law enforcement officers will have little difficulty putting into practice our holding that undercover agents need not

give *Miranda* warnings to incarcerated suspects. The use of undercover agents is a recognized law enforcement technique, often employed in the prison context to detect violence against correctional officials or inmates, as well as for the purposes served here. The interests protected by *Miranda* are not implicated in these cases, and the warnings are not required to safeguard the constitutional rights of inmates who make voluntary statements to undercover agents.

We hold that an undercover law enforcement officer posing as a fellow inmate need not give *Miranda* warnings to an incarcerated suspect before asking questions that may elicit an incriminating response. The statements at issue in this case were voluntary, and there is no federal obstacle to their admissibility at trial. We now reverse and remand for proceedings not inconsistent with our opinion.

It is so ordered.

JUSTICE BRENNAN, concurring in the judgment.

The Court holds that *Miranda* v. *Arizona*, 384 U. S. 436 (1966), does not require suppression of a statement made by an incarcerated suspect to an undercover agent. Although I do not subscribe to the majority's characterization of *Miranda* in its entirety, I do agree that when a suspect does not know that his questioner is a police agent, such questioning does not amount to "interrogation" in an "inherently coercive" environment so as to require application of *Miranda*. Since the only issue raised at this stage of the litigation is the applicability of *Miranda*,* I concur in the judgment of the Court.

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*As the case comes to us, it involves only the question whether *Miranda* applies to the questioning of an incarcerated suspect by an undercover agent. Nothing in the Court's opinion suggests that, had respondent previously invoked his Fifth Amendment right to counsel or right to silence, his statements would be admissible. If respondent had invoked either right, the inquiry would focus on whether he subsequently waived the particular right. See *Edwards* v. *Arizona*, 451 U. S. 477 (1981); *Michigan* v. *Mosley* 423 U. S. 96, 104 (1975). As the Court made clear in

This is not to say that I believe the Constitution condones the method by which the police extracted the confession in this case. To the contrary, the deception and manipulation practiced on respondent raise a substantial claim that the confession was obtained in violation of the Due Process Clause. As we recently stated in *Miller* v. *Fenton*, 474 U. S. 104, 109–110 (1985):

> "This Court has long held that certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment. . . . Although these decisions framed the legal inquiry in a variety of different ways, usually through the 'convenient shorthand' of asking whether the confession was 'involuntary,' *Blackburn* v. *Alabama*, 361 U. S. 199, 207 (1960), the Court's analysis has consistently been animated by the view that 'ours is an accusatorial and not an inquisitorial system,' *Rogers* v. *Richmond*, 365 U. S. 534, 541 (1961), and that, accordingly, tactics for eliciting inculpatory statements must fall within the broad constitutional boundaries imposed by the Fourteenth Amendment's guarantee of fundamental fairness."

Moran v. *Burbine*, 475 U. S. 412, 421 (1986), the waiver of *Miranda* rights "must [be] voluntary in the sense that it [must be] the product of a free and deliberate choice rather than *intimidation, coercion or deception*." (Emphasis added.) Since respondent was in custody on an unrelated charge when he was questioned, he may be able to challenge the admission of these statements if he previously had invoked his *Miranda* rights with respect to that charge. See *Arizona* v. *Roberson*, 486 U. S. 675 (1988); *Mosley*, *supra*, at 104. Similarly, if respondent had been formally charged on the unrelated charge and had invoked his Sixth Amendment right to counsel, he may have a Sixth Amendment challenge to the admissibility of these statements. See *Michigan* v. *Jackson*, 475 U. S. 625, 629–636 (1986). Cf. *Roberson*, *supra*, at 683–685.

That the right is derived from the Due Process Clause "is significant because it reflects the Court's consistently held view that the admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne." *Id.*, at 116. See *Spano* v. *New York*, 360 U. S. 315, 320–321 (1959) ("The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves"); see also *Degraffenreid* v. *McKellar*, 494 U. S. 1071, 1072–1074 (1990) (MARSHALL, J., joined by BRENNAN, J., dissenting from denial of certiorari).

The method used to elicit the confession in this case deserves close scrutiny. The police devised a ruse to lure respondent into incriminating himself when he was in jail on an unrelated charge. A police agent, posing as a fellow inmate and proposing a sham escape plot, tricked respondent into confessing that he had once committed a murder, as a way of proving that he would be willing to do so again should the need arise during the escape. The testimony of the undercover officer and a police informant at the suppression hearing reveal the deliberate manner in which the two elicited incriminating statements from respondent. See App. 43–53 and 66–73. We have recognized that "the mere fact of custody imposes pressures on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover Government agents." *United States* v. *Henry*, 447 U. S. 264, 274 (1980). As JUSTICE MARSHALL points out, the pressures of custody make a suspect more likely to confide in others and to engage

in "jailhouse bravado." See *post*, at 307–308. The State is in a unique position to exploit this vulnerability because it has virtually complete control over the suspect's environment. Thus, the State can ensure that a suspect is barraged with questions from an undercover agent until the suspect confesses. Cf. *Mincey* v. *Arizona*, 437 U. S. 385, 399 (1978); *Ashcraft* v. *Tennessee*, 322 U. S. 143, 153–155 (1944). The testimony in this case suggests the State did just that.

The deliberate use of deception and manipulation by the police appears to be incompatible "with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means," *Miller*, *supra*, at 116, and raises serious concerns that respondent's will was overborne. It is open to the lower court on remand to determine whether, under the totality of the circumstances, respondent's confession was elicited in a manner that violated the Due Process Clause. That the confession was not elicited through means of physical torture, see *Brown* v. *Mississippi*, 297 U. S. 278 (1936) or overt psychological pressure, see *Payne* v. *Arkansas*, 356 U. S. 560, 566 (1958), does not end the inquiry. "[A]s law enforcement officers become more responsible, and the methods used to extract confessions more sophisticated, [a court's] duty to enforce federal constitutional protections does not cease. It only becomes more difficult because of the more delicate judgments to be made." *Spano*, *supra*, at 321.

JUSTICE MARSHALL, dissenting.

This Court clearly and simply stated its holding in *Miranda* v. *Arizona*, 384 U. S. 436 (1966): "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.*, at 444. The conditions that require the police to apprise a defendant of his constitutional rights—custodial interrogation conducted by an agent of the police—were present in this

case. Because Lloyd Perkins received no *Miranda* warnings before he was subjected to custodial interrogation, his confession was not admissible.

The Court reaches the contrary conclusion by fashioning an exception to the *Miranda* rule that applies whenever "an undercover law enforcement officer posing as a fellow inmate . . . ask[s] questions that may elicit an incriminating response" from an incarcerated suspect. *Ante*, at 300. This exception is inconsistent with the rationale supporting *Miranda* and allows police officers intentionally to take advantage of suspects unaware of their constitutional rights. I therefore dissent.

The Court does not dispute that the police officer here conducted a custodial interrogation of a criminal suspect. Perkins was incarcerated in county jail during the questioning at issue here; under these circumstances, he was in custody as that term is defined in *Miranda*. 384 U. S., at 444; *Mathis* v. *United States*, 391 U. S. 1, 4–5 (1968) (holding that defendant incarcerated on charges different from the crime about which he is questioned was in custody for purposes of *Miranda*). The United States argues that Perkins was not in custody for purpose of *Miranda* because he was familiar with the custodial environment as a result of being in jail for two days and previously spending time in prison. Brief for United States as *Amicus Curiae* 11. Perkins' familiarity with confinement, however, does not transform his incarceration into some sort of noncustodial arrangement. Cf. *Orozco* v. *Texas*, 394 U. S. 324 (1969) (holding that suspect who had been arrested in his home and then questioned in his bedroom was in custody, notwithstanding his familiarity with the surroundings).

While Perkins was confined, an undercover police officer, with the help of a police informant, questioned him about a serious crime. Although the Court does not dispute that Perkins was interrogated, it downplays the nature of the 35-minute questioning by disingenuously referring to it as a

"conversatio[n]." *Ante*, at 295, 296. The officer's narration of the "conversation" at Perkins' suppression hearing, however, reveals that it clearly was an interrogation.

> "[Agent:] You ever do anyone?
>
> "[Perkins:] Yeah, once in East St. Louis, in a rich white neighborhood.
>
> "Informant: I didn't know they had any rich white neighborhoods in East St. Louis.
>
> "Perkins: It wasn't in East St. Louis, it was by a race track in Fairview Heights. . . .
>
> "[Agent]: You did a guy in Fairview Heights?
>
> "Perkins: Yeah in a rich white section where most of the houses look the same.
>
> "[Informant]: If all the houses look the same, how did you know you had the right house?
>
> "Perkins: Me and two guys cased the house for about a week. I knew exactly which house, the second house on the left from the corner.
>
> "[Agent]: How long ago did this happen?
>
> "Perkins: Approximately about two years ago. I got paid $5,000 for that job.
>
> "[Agent]: How did it go down?
>
> "Perkins: I walked up [to] this guy['s] house with a sawed-off under my trench coat.
>
> "[Agent]: What type gun[?]
>
> "Perkins: A .12 gauge Remmington *[sic]* Automatic Model 1100 sawed-off." App. 49–50.

The police officer continued the inquiry, asking a series of questions designed to elicit specific information about the victim, the crime scene, the weapon, Perkins' motive, and his actions during and after the shooting. *Id.*, at 50–52. This interaction was not a "conversation"; Perkins, the officer, and the informant were not equal participants in a free-ranging discussion, with each man offering his views on different topics. Rather, it was an interrogation: Perkins was subjected to express questioning likely to evoke an incriminating re-

sponse. *Rhode Island* v. *Innis*, 446 U. S. 291, 300–301 (1980).

Because Perkins was interrogated by police while he was in custody, *Miranda* required that the officer inform him of his rights. In rejecting that conclusion, the Court finds that "conversations" between undercover agents and suspects are devoid of the coercion inherent in station house interrogations conducted by law enforcement officials who openly represent the State. *Ante*, at 296. *Miranda* was not, however, concerned solely with police *coercion*. It dealt with *any* police tactics that may operate to compel a suspect in custody to make incriminating statements without full awareness of his constitutional rights. See *Miranda*, *supra*, at 468 (referring to "inherent pressures of the interrogation atmosphere"); *Estelle* v. *Smith*, 451 U. S. 454, 467 (1981) ("The purpose of [the *Miranda*] admonitions is to combat what the Court saw as 'inherently compelling pressures' at work on the person and to provide him with an awareness of the Fifth Amendment privilege and the consequences of forgoing it") (quoting *Miranda*, 384 U. S., at 467). Thus, when a law enforcement agent structures a custodial interrogation so that a suspect feels compelled to reveal incriminating information, he must inform the suspect of his constitutional rights and give him an opportunity to decide whether or not to talk.

The compulsion proscribed by *Miranda* includes deception by the police. See *Miranda*, *supra*, at 453 (indicting police tactics "to induce a confession out of trickery," such as using fictitious witnesses or false accusations); *Berkemer* v. *McCarty*, 468 U. S. 420, 433 (1984) ("The purposes of the safeguards prescribed by *Miranda* are to ensure that the police do not coerce *or* trick captive suspects into confessing") (emphasis deleted and added). Cf. *Moran* v. *Burbine*, 475 U. S. 412, 421 (1986) ("[T]he relinquishment of the right [protected by the *Miranda* warnings] must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, *or* deception") (em-

phasis added). Although the Court did not find trickery by itself sufficient to constitute compulsion in *Hoffa* v. *United States*, 385 U. S. 293 (1966), the defendant in that case was not in custody. Perkins, however, was interrogated while incarcerated. As the Court has acknowledged in the Sixth Amendment context: "[T]he mere fact of custody imposes pressures on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover Government agents." *United States* v. *Henry*, 447 U. S. 264, 274 (1980). See also *Massiah* v. *United States*, 377 U. S. 201, 206 (1964) (holding, in the context of the Sixth Amendment, that defendant's constitutional privilege against self-incrimination was "more seriously imposed upon . . . because he did not even know that he was under interrogation by a government agent") (citation and internal quotation marks omitted).

Custody works to the State's advantage in obtaining incriminating information. The psychological pressures inherent in confinement increase the suspect's anxiety, making him likely to seek relief by talking with others. Dix, Undercover Investigations and Police Rulemaking, 53 Texas L. Rev. 203, 230 (1975). See also Gibbs, The First Cut is the Deepest: Psychological Breakdown and Survival in the Detention Setting, in The Pains of Imprisonment 97, 107 (R. Johnson & H. Toch eds. 1982); Hagel-Seymour, Environmental Sanctuaries for Susceptible Prisoners, in The Pains of Imprisonment, *supra*, at 267, 279; Chicago Tribune, Apr. 15, 1990, p. D3 (prosecutors have found that prisoners often talk freely with fellow inmates). The inmate is thus more susceptible to efforts by undercover agents to elicit information from him. Similarly, where the suspect is incarcerated, the constant threat of physical danger peculiar to the prison environment may make him demonstrate his toughness to other inmates by recounting or inventing past violent acts. "Because the suspect's ability to select people with whom he can confide is completely within their control, the police have a

unique opportunity to exploit the suspect's vulnerability. In short, the police can insure that if the pressures of confinement lead the suspect to confide in anyone, it will be a police agent." (Footnote omitted.) White, Police Trickery in Inducing Confessions, 127 U. Pa. L. Rev. 581, 605 (1979). In this case, the police deceptively took advantage of Perkins' psychological vulnerability by including him in a sham escape plot, a situation in which he would feel compelled to demonstrate his willingness to shoot a prison guard by revealing his past involvement in a murder. See App. 49 (agent stressed that a killing might be necessary in the escape and then asked Perkins if he had ever murdered someone).

Thus, the pressures unique to custody allow the police to use deceptive interrogation tactics to compel a suspect to make an incriminating statement. The compulsion is not eliminated by the suspect's ignorance of his interrogator's true identity. The Court therefore need not inquire past the bare facts of custody and interrogation to determine whether *Miranda* warnings are required.

The Court's adoption of an exception to the *Miranda* doctrine is incompatible with the principle, consistently applied by this Court, that the doctrine should remain simple and clear. See, *e. g.*, *Miranda*, *supra*, at 441–442 (noting that one reason certiorari was granted was "to give concrete constitutional guidelines for law enforcement agencies and courts to follow"); *McCarty*, *supra*, at 430 (noting that one of "the principal advantages of the *[Miranda]* doctrine . . . is the clarity of that rule"); *Arizona* v. *Roberson*, 486 U. S. 675, 680 (1988) (same). See also *New York* v. *Quarles*, 467 U. S. 649, 657–658 (1984) (recognizing need for clarity in *Miranda* doctrine and finding that narrow "public safety" exception would not significantly lessen clarity and would be easy for police to apply). We explained the benefits of a bright-line rule in *Fare* v. *Michael C.*, 442 U. S. 707 (1979): "*Miranda*'s holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custo-

dial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible." *Id.*, at 718.

The Court's holding today complicates a previously clear and straightforward doctrine. The Court opines that "[l]aw enforcement officers will have little difficulty putting into practice our holding that undercover agents need not give *Miranda* warnings to incarcerated suspects." *Ante*, at 299–300. Perhaps this prediction is true with respect to fact patterns virtually identical to the one before the Court today. But the outer boundaries of the exception created by the Court are by no means clear. Would *Miranda* be violated, for instance, if an undercover police officer beat a confession out of a suspect, but the suspect thought the officer was another prisoner who wanted the information for his own purposes?

Even if *Miranda*, as interpreted by the Court, would not permit such obviously compelled confessions, the ramifications of today's opinion are still disturbing. The exception carved out of the *Miranda* doctrine today may well result in a proliferation of departmental policies to encourage police officers to conduct interrogations of confined suspects through undercover agents, thereby circumventing the need to administer *Miranda* warnings. Indeed, if *Miranda* now requires a police officer to issue warnings only in those situations in which the suspect might feel compelled "to speak by the fear of reprisal for remaining silent or in the hope of more lenient treatment should he confess," *ante*, at 296–297, presumably it allows custodial interrogation by an undercover officer posing as a member of the clergy or a suspect's defense attorney. Although such abhorrent tricks would play on a suspect's need to confide in a trusted adviser, neither would cause the suspect to "think that the listeners have official power over him," *ante*, at 297. The Court's adoption of the "undercover agent" exception to the *Miranda* rule thus is necessarily also the adoption of a substantial loophole in our jurisprudence protecting suspects' Fifth Amendment rights.

I dissent.

UNITED STATES *v.* EICHMAN ET AL.

APPEAL FROM THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 89–1433. Argued May 14, 1990—Decided June 11, 1990*

After this Court held, in *Texas* v. *Johnson*, 491 U. S. 397, that a Texas statute criminalizing desecration of the United States flag in a way that the actor knew would seriously offend onlookers was unconstitutional as applied to an individual who had burned a flag during a political protest, Congress passed the Flag Protection Act of 1989. The Act criminalizes the conduct of anyone who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon" a United States flag, except conduct related to the disposal of a "worn or soiled" flag. Subsequently, appellees were prosecuted in the District Courts for violating the Act: some for knowingly burning several flags while protesting various aspects of the Government's policies, and others, in a separate incident, for knowingly burning a flag while protesting the Act's passage. In each case, appellees moved to dismiss the charges on the ground that the Act violates the First Amendment. Both District Courts, following *Johnson*, *supra*, held the Act unconstitutional as applied and dismissed the charges.

Held: Appellees' prosecution for burning a flag in violation of the Act is inconsistent with the First Amendment. The Government concedes, as it must, that appellees' flag burning constituted expressive conduct, and this Court declines to reconsider its rejection in *Johnson* of the claim that flag burning as a mode of expression does not enjoy the First Amendment's full protection. It is true that this Act, unlike the Texas law, contains no explicit content-based limitation on the scope of prohibited conduct. Nevertheless, it is clear that the Government's asserted *interest* in protecting the "physical integrity" of a privately owned flag in order to preserve the flag's status as a symbol of the Nation and certain national ideals is related to the suppression, and concerned with the content, of free expression. The mere destruction or disfigurement of a symbol's physical manifestation does not diminish or otherwise affect the symbol itself. The Government's interest is implicated only when a person's treatment of the flag communicates a message to others that is inconsistent with the identified ideals. The precise language of the Act's

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*Together with No. 89–1434, *United States* v. *Haggerty et al.*, on appeal from the District Court for the Western District of Washington.

prohibitions confirms Congress' interest in the communicative impact of flag destruction, since each of the specified terms—with the possible exception of "burns"—unmistakably connotes disrespectful treatment of the flag and suggests a focus on those acts likely to damage the flag's symbolic value, and since the explicit exemption for disposal of "worn or soiled" flags protects certain acts traditionally associated with patriotic respect for the flag. Thus, the Act suffers from the same fundamental flaw as the Texas law, and its restriction on expression cannot "'be justified without reference to the content of the regulated speech,'" *Boos* v. *Barry*, 485 U. S. 312, 320. It must therefore be subjected to "the most exacting scrutiny," *id.*, at 321, and, for the reasons stated in *Johnson*, *supra*, at 413–415, the Government's interest cannot justify its infringement on First Amendment rights. This conclusion will not be reassessed in light of Congress' recent recognition of a purported "national consensus" favoring a prohibition on flag burning, since any suggestion that the Government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment. While flag desecration—like virulent ethnic and religious epithets, vulgar repudiations of the draft, and scurrilous caricatures—is deeply offensive to many, the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. Pp. 313–319.

No. 89–1433, 731 F. Supp. 1123; No. 89–1434, 731 F. Supp. 415, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, SCALIA, and KENNEDY, JJ., joined. STEVENS, J., filed a dissenting opinion, in which REHNQUIST, C. J., and WHITE and O'CONNOR, JJ., joined, *post*, p. 319.

Solicitor General Starr argued the cause for the United States. With him on the briefs were *Assistant Attorney General Dennis*, *Deputy Solicitor General Roberts*, and *Michael R. Lazerwitz*.

William M. Kunstler argued the cause for appellees in both cases. With him on the brief in both cases were *Ronald L. Kuby*, *David D. Cole*, *Nina Kraut*, and *Kevin Peck*. *Charles S. Hamilton III*, by appointment of the Court, 495 U. S. 902, filed a brief in No. 89–1434 for appellee Strong.†

†Briefs of *amici curiae* urging reversal were filed for the United States Senate by *Michael Davidson*, *Ken U. Benjamin, Jr.*, and *Morgan J. Frankel*; for Senator Joseph R. Biden, Jr., by *Kenneth S. Geller*, *Andrew*

JUSTICE BRENNAN delivered the opinion of the Court.

In these consolidated appeals, we consider whether appellees' prosecution for burning a United States flag in violation of the Flag Protection Act of 1989 is consistent with the First Amendment. Applying our recent decision in *Texas* v. *Johnson*, 491 U. S. 397 (1989), the District Courts held that the Act cannot constitutionally be applied to appellees. We affirm.

I

In No. 89–1433, the United States prosecuted certain appellees for violating the Flag Protection Act of 1989, 103 Stat. 777, 18 U. S. C. § 700 (1988 ed. and Supp. I), by knowingly setting fire to several United States flags on the steps of the United States Capitol while protesting various aspects of the Government's domestic and foreign policy. In No. 89–1434, the United States prosecuted other appellees for violating the Act by knowingly setting fire to a United States flag in Seattle while protesting the Act's passage. In each case, the respective appellees moved to dismiss the flag-burning charge on the ground that the Act, both on its face and as applied, violates the First Amendment. Both the

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J. Pincus, and *Roy T. Englert, Jr.*; for Governor Mario M. Cuomo by *Evan A. Davis*; and for the Southeastern Legal Foundation, Inc., by *Robert L. Barr, Jr.*, and *G. Stephen Parker*.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Charles Fried, Kathleen M. Sullivan, Norman Dorsen*, and *Steven R. Shapiro*; for the Association of Art Museum Directors et al. by *James C. Goodale*; for the National Association for the Advancement of Colored People by *Charles E. Carter*; for People for the American Way et al. by *Timothy B. Dyk, Glen D. Nager*, and *Elliot M. Mincberg*; and for Jasper Johns et al. by *Robert G. Sugarman* and *Gloria C. Phares*.

Briefs of *amici curiae* were filed for the Speaker and Leadership Group of the United States House of Representatives by *Steven R. Ross, Charles Tiefer, Michael L. Murray, Janina Jaruzelski*, and *Robert Michael Long*; and for the American Bar Association by *Stanley Chauvin, Jr., Randolph W. Thrower*, and *Robert B. McKay*.

United States District Court for the Western District of Washington, 731 F. Supp. 415 (1990), and the United States District Court for the District of Columbia, 731 F. Supp. 1123 (1990), following *Johnson*, *supra*, held the Act unconstitutional as applied to appellees and dismissed the charges.[1] The United States appealed both decisions directly to this Court pursuant to 18 U. S. C. § 700(d) (1982 ed., Supp. I).[2] We noted probable jurisdiction and consolidated the two cases. 494 U. S. 1063 (1990).

II

Last Term in *Johnson*, we held that a Texas statute criminalizing the desecration of venerated objects, including the United States flag, was unconstitutional as applied to an individual who had set such a flag on fire during a political demonstration. The Texas statute provided that "[a] person commits an offense if he intentionally or knowingly desecrates . . . [a] national flag," where "desecrate" meant to "deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action." Tex. Penal Code Ann. § 42.09 (1989). We first held that Johnson's flag burning was "conduct 'sufficiently imbued with elements of communication' to implicate the First Amendment." 491 U. S., at 406 (citation omitted). We next considered and rejected the State's contention that, under *United States* v. *O'Brien*,

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[1] The Seattle appellees were also charged with causing willful injury to federal property in violation of 18 U. S. C. §§ 1361 and 1362. This charge remains pending before the District Court, and nothing in today's decision affects the constitutionality of this prosecution. See n. 5, *infra*.

[2] "(1) An appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order issued by a United States district court ruling upon the constitutionality of subsection (a).

"(2) The Supreme Court shall, if it has not previously ruled on the question, accept jurisdiction over the appeal and advance on the docket and expedite to the greatest extent possible." 18 U. S. C. § 700(d) (1988 ed., Supp. I).

391 U. S. 367 (1968), we ought to apply the deferential standard with which we have reviewed Government regulations of conduct containing both speech and nonspeech elements where "the governmental interest is unrelated to the suppression of free expression." *Id.*, at 377. We reasoned that the State's asserted interest "in preserving the flag as a symbol of nationhood and national unity," was an interest "related 'to the suppression of free expression' within the meaning of *O'Brien*" because the State's concern with protecting the flag's symbolic meaning is implicated "only when a person's treatment of the flag communicates some message." *Johnson*, *supra*, at 410. We therefore subjected the statute to "'the most exacting scrutiny,'" 491 U. S., at 412, quoting *Boos* v. *Barry*, 485 U. S. 312, 321 (1988), and we concluded that the State's asserted interests could not justify the infringement on the demonstrator's First Amendment rights.

After our decision in *Johnson*, Congress passed the Flag Protection Act of 1989.[3] The Act provides in relevant part:

> "(a)(1) Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both.
>
> "(2) This subsection does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled.
>
> "(b) As used in this section, the term 'flag of the United States' means any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed." 18 U. S. C. § 700 (1988 ed., Supp. I).

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[3] The Act replaced the then-existing federal flag-burning statute, which Congress perceived might be unconstitutional in light of *Johnson*. Former 18 U. S. C. § 700(a) prohibited "knowingly cast[ing] contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it."

The Government concedes in these cases, as it must, that appellees' flag burning constituted expressive conduct, Brief for United States 28; see *Johnson*, 491 U. S., at 405–406, but invites us to reconsider our rejection in *Johnson* of the claim that flag burning as a mode of expression, like obscenity or "fighting words," does not enjoy the full protection of the First Amendment. Cf. *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572 (1942). This we decline to do.[4] The only remaining question is whether the Flag Protection Act is sufficiently distinct from the Texas statute that it may constitutionally be applied to proscribe appellees' expressive conduct.

The Government contends that the Flag Protection Act is constitutional because, unlike the statute addressed in *Johnson*, the Act does not target expressive conduct on the basis of the content of its message. The Government asserts an interest in "protect[ing] the physical integrity of the flag under all circumstances" in order to safeguard the flag's identity "'as the unique and unalloyed symbol of the Nation.'" Brief for United States 28, 29. The Act proscribes conduct (other than disposal) that damages or mistreats a flag, without regard to the actor's motive, his intended message, or the likely effects of his conduct on onlookers. By contrast, the Texas statute expressly prohibited only those acts of physical flag desecration "that the actor knows will seriously offend" onlookers, and the former federal statute prohibited only those acts of desecration that "cas[t] contempt upon" the flag.

Although the Flag Protection Act contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted *interest* is "related 'to the suppression of free expression,'" 491 U. S., at 410, and concerned with the content of such expression. The Government's interest in protecting the "physical integ-

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[4] We deal here with concededly political speech and have no occasion to pass on the validity of laws regulating commercial exploitation of the image of the United States flag. See *Texas* v. *Johnson*, 491 U. S. 397, 415–416, n. 10 (1989); cf. *Halter* v. *Nebraska*, 205 U. S. 34 (1907).

rity" of a privately owned flag[5] rests upon a perceived need to preserve the flag's status as a symbol of our Nation and certain national ideals. But the mere destruction or disfigurement of a particular physical manifestation of the symbol, without more, does not diminish or otherwise affect the symbol itself in any way. For example, the secret destruction of a flag in one's own basement would not threaten the flag's recognized meaning. Rather, the Government's desire to preserve the flag as a symbol for certain national ideals is implicated "only when a person's treatment of the flag communicates [a] message" to others that is inconsistent with those ideals.[6] *Ibid.*

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[5] Today's decision does not affect the extent to which the Government's interest in protecting publicly owned flags might justify special measures on their behalf. See *Spence* v. *Washington*, 418 U. S. 405, 408–409 (1974); cf. *Johnson*, *supra*, at 412–413, n. 8.

[6] Aside from the flag's association with particular ideals, at some irreducible level the flag is emblematic of the Nation as a sovereign entity. The Government's *amici* assert that it has a legitimate nonspeech-related interest in safeguarding this "eminently practical legal aspect of the flag, as an incident of sovereignty." Brief for the Speaker and Leadership Group of the U. S. House of Representatives as *Amici Curiae* 25. This interest has firm historical roots: "While the symbolic role of the flag is now well-established, the flag was an important incident of sovereignty before it was used for symbolic purposes by patriots and others. When the nation's founders first determined to adopt a national flag, they intended to serve specific functions relating to our status as a sovereign nation." *Id.*, at 9; see *id.*, at 5 (noting "flag's 'historic function' for such sovereign purposes as marking 'our national presence in schools, public buildings, battleships and airplanes'") (citation omitted).

We concede that the Government has a legitimate interest in preserving the flag's function as an "incident of sovereignty," though we need not address today the extent to which this interest may justify any laws regulating conduct that would thwart this core function, as might a commercial or like appropriation of the image of the United States flag. *Amici* do not, and cannot, explain how a statute that penalizes anyone who knowingly burns, mutilates, or defiles any American flag is designed to advance this asserted interest in maintaining the association between the flag and the Nation. Burning a flag does not threaten to interfere with this association

Moreover, the precise language of the Act's prohibitions confirms Congress' interest in the communicative impact of flag destruction. The Act criminalizes the conduct of anyone who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag." 18 U. S. C. § 700(a)(1) (1988 ed., Supp. I). Each of the specified terms—with the possible exception of "burns"—unmistakably connotes disrespectful treatment of the flag and suggests a focus on those acts likely to damage the flag's symbolic value.[7] And the explicit exemption in § 700(a)(2) for disposal of "worn or soiled" flags protects certain acts traditionally associated with patriotic respect for the flag.[8]

As we explained in *Johnson*, *supra*, at 416–417: "[I]f we were to hold that a State may forbid flag burning wherever it is likely to endanger the flag's symbolic role, but allow it wherever burning a flag promotes that role—as where, for example, a person ceremoniously burns a dirty flag—we would be . . . permitting a State to 'prescribe what shall be orthodox' by saying that one may burn the flag to convey one's attitude toward it and its referents only if one does not endanger the flag's representation of nationhood and national unity." Although Congress cast the Flag Protection Act of 1989 in somewhat broader terms than the Texas statute at issue in *Johnson*, the Act still suffers from the same fundamental flaw: It suppresses expression out of concern for its likely communicative impact. Despite the Act's wider scope,

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in any way; indeed, the flag burner's message depends in part on the viewer's ability to make this very association.

[7] For example, "defile" is defined as "to make filthy; to corrupt the purity or perfection of; to rob of chastity; to make ceremonially unclean; tarnish, dishonor." Webster's Third New International Dictionary 592 (1976). "Trample" is defined as "to tread heavily so as to bruise, crush, or injure; to inflict injury or destruction: have a contemptuous or ruthless attitude." *Id.*, at 2425.

[8] The Act also does not prohibit flying a flag in a storm or other conduct that threatens the physical integrity of the flag, albeit in an indirect manner unlikely to communicate disrespect.

its restriction on expression cannot be "'justified without reference to the content of the regulated speech.'" *Boos*, 485 U. S., at 320 (emphasis omitted) (citation omitted); see *Spence* v. *Washington*, 418 U. S. 405, 414, nn. 8, 9 (1974) (State's interest in protecting flag's symbolic value is directly related to suppression of expression and thus *O'Brien* test is inapplicable even where statute declared "simply . . . that *nothing* may be affixed to or superimposed on a United States flag"). The Act therefore must be subjected to "the most exacting scrutiny," *Boos*, *supra*, at 321, and for the reasons stated in *Johnson*, 491 U. S., at 413–415, the Government's interest cannot justify its infringement on First Amendment rights. We decline the Government's invitation to reassess this conclusion in light of Congress' recent recognition of a purported "national consensus" favoring a prohibition on flag burning. Brief for United States 27. Even assuming such a consensus exists, any suggestion that the Government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment.

III

"'National unity as an end which officials may foster by persuasion and example is not in question.'" *Johnson*, *supra*, at 418, quoting *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 640 (1943). Government may create national symbols, promote them, and encourage their respectful treatment.[9] But the Flag Protection Act of 1989 goes well beyond this by criminally proscribing expressive conduct because of its likely communicative impact.

We are aware that desecration of the flag is deeply offensive to many. But the same might be said, for example, of virulent ethnic and religious epithets, see *Terminiello* v. *Chicago*, 337 U. S. 1 (1949), vulgar repudiations of the draft, see

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[9] See, *e. g.*, 36 U. S. C. §§ 173–177 (suggesting manner in which flag ought to be displayed).

Cohen v. *California*, 403 U. S. 15 (1971), and scurrilous caricatures, see *Hustler Magazine, Inc.* v. *Falwell*, 485 U. S. 46 (1988). "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Johnson*, *supra*, at 414. Punishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering. The judgments of the District Courts are

Affirmed.

JUSTICE STEVENS, with whom THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE O'CONNOR join, dissenting.

The Court's opinion ends where proper analysis of the issue should begin. Of course "the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Ante* this page. None of us disagrees with that proposition. But it is equally well settled that certain methods of expression may be prohibited if (a) the prohibition is supported by a legitimate societal interest that is unrelated to suppression of the ideas the speaker desires to express; (b) the prohibition does not entail any interference with the speaker's freedom to express those ideas by other means; and (c) the interest in allowing the speaker complete freedom of choice among alternative methods of expression is less important than the societal interest supporting the prohibition.

Contrary to the position taken by counsel for the flag burners in *Texas* v. *Johnson*, 491 U. S. 397 (1989), it is now conceded that the Federal Government has a legitimate interest in protecting the symbolic value of the American flag. Obviously that value cannot be measured, or even described, with any precision. It has at least these two components: In times of national crisis, it inspires and motivates the average citizen to make personal sacrifices in order to achieve societal goals of overriding importance; at all times, it serves as a re-

minder of the paramount importance of pursuing the ideals that characterize our society.

The first question the Court should consider is whether the interest in preserving the value of that symbol is unrelated to suppression of the ideas that flag burners are trying to express. In my judgment the answer depends, at least in part, on what those ideas are. A flag burner might intend various messages. The flag burner may wish simply to convey hatred, contempt, or sheer opposition directed at the United States. This might be the case if the flag were burned by an enemy during time of war. A flag burner may also, or instead, seek to convey the depth of his personal conviction about some issue, by willingly provoking the use of force against himself. In so doing, he says that "my disagreement with certain policies is so strong that I am prepared to risk physical harm (and perhaps imprisonment) in order to call attention to my views." This second possibility apparently describes the expressive conduct of the flag burners in these cases. Like the protesters who dramatized their opposition to our engagement in Vietnam by publicly burning their draft cards—and who were punished for doing so—their expressive conduct is consistent with affection for this country and respect for the ideals that the flag symbolizes. There is at least one further possibility: A flag burner may intend to make an accusation against the integrity of the American people who disagree with him. By burning the embodiment of America's collective commitment to freedom and equality, the flag burner charges that the majority has forsaken that commitment—that continued respect for the flag is nothing more than hypocrisy. Such a charge may be made even if the flag burner loves the country and zealously pursues the ideals that the country claims to honor.

The idea expressed by a particular act of flag burning is necessarily dependent on the temporal and political context in which it occurs. In the 1960's it may have expressed opposition to the country's Vietnam policies, or at least to the

compulsory draft. In *Texas* v. *Johnson*, it apparently expressed opposition to the platform of the Republican Party. In these cases, the appellees have explained that it expressed their opposition to racial discrimination, to the failure to care for the homeless, and of course to statutory prohibitions of flag burning. In any of these examples, the protesters may wish both to say that their own position is the only one faithful to liberty and equality, and to accuse their fellow citizens of hypocritical indifference to—or even of a selfish departure from—the ideals which the flag is supposed to symbolize. The ideas expressed by flag burners are thus various and often ambiguous.

The Government's legitimate interest in preserving the symbolic value of the flag is, however, essentially the same regardless of which of many different ideas may have motivated a particular act of flag burning. As I explained in my dissent in *Johnson*, 491 U. S., at 436–439, the flag uniquely symbolizes the ideas of liberty, equality, and tolerance—ideas that Americans have passionately defended and debated throughout our history. The flag embodies the spirit of our national commitment to those ideals. The message thereby transmitted does not take a stand upon our disagreements, except to say that those disagreements are best regarded as competing interpretations of shared ideals. It does not judge particular policies, except to say that they command respect when they are enlightened by the spirit of liberty and equality. To the world, the flag is our promise that we will continue to strive for these ideals. To us, the flag is a reminder both that the struggle for liberty and equality is unceasing, and that our obligation of tolerance and respect for all of our fellow citizens encompasses those who disagree with us—indeed, even those whose ideas are disagreeable or offensive.

Thus, the Government may—indeed, it should—protect the symbolic value of the flag without regard to the specific content of the flag burners' speech. The prosecution in these

cases does not depend upon the object of the defendants' protest. It is, moreover, equally clear that the prohibition does not entail any interference with the speaker's freedom to express his or her ideas by other means. It may well be true that other means of expression may be less effective in drawing attention to those ideas, but that is not itself a sufficient reason for immunizing flag burning. Presumably a gigantic fireworks display or a parade of nude models in a public park might draw even more attention to a controversial message, but such methods of expression are nevertheless subject to regulation.

These cases therefore come down to a question of judgment. Does the admittedly important interest in allowing every speaker to choose the method of expressing his or her ideas that he or she deems most effective and appropriate outweigh the societal interest in preserving the symbolic value of the flag? This question, in turn, involves three different judgments: (1) The importance of the individual interest in selecting the preferred means of communication; (2) the importance of the national symbol; and (3) the question whether tolerance of flag burning will enhance or tarnish that value. The opinions in *Texas* v. *Johnson* demonstrate that reasonable judges may differ with respect to each of these judgments.

The individual interest is unquestionably a matter of great importance. Indeed, it is one of the critical components of the idea of liberty that the flag itself is intended to symbolize. Moreover, it is buttressed by the societal interest in being alerted to the need for thoughtful response to voices that might otherwise go unheard. The freedom of expression protected by the First Amendment embraces not only the freedom to communicate particular ideas, but also the right to communicate them effectively. That right, however, is not absolute—the communicative value of a well-placed bomb in the Capitol does not entitle it to the protection of the First Amendment.

Burning a flag is not, of course, equivalent to burning a public building. Assuming that the protester is burning his own flag, it causes no physical harm to other persons or to their property. The impact is purely symbolic, and it is apparent that some thoughtful persons believe that impact, far from depreciating the value of the symbol, will actually enhance its meaning. I most respectfully disagree. Indeed, what makes these cases particularly difficult for me is what I regard as the damage to the symbol that has already occurred as a result of this Court's decision to place its stamp of approval on the act of flag burning. A formerly dramatic expression of protest is now rather commonplace. In today's marketplace of ideas, the public burning of a Vietnam draft card is probably less provocative than lighting a cigarette. Tomorrow flag burning may produce a similar reaction. There is surely a direct relationship between the communicative value of the act of flag burning and the symbolic value of the object being burned.

The symbolic value of the American flag is not the same today as it was yesterday. Events during the last three decades have altered the country's image in the eyes of numerous Americans, and some now have difficulty understanding the message that the flag conveyed to their parents and grandparents—whether born abroad and naturalized or native born. Moreover, the integrity of the symbol has been compromised by those leaders who seem to advocate compulsory worship of the flag even by individuals whom it offends, or who seem to manipulate the symbol of national purpose into a pretext for partisan disputes about meaner ends. And, as I have suggested, the residual value of the symbol after this Court's decision in *Texas* v. *Johnson* is surely not the same as it was a year ago.

Given all these considerations, plus the fact that the Court today is really doing nothing more than reconfirming what it has already decided, it might be appropriate to defer to the judgment of the majority and merely apply the doctrine of

stare decisis to the cases at hand. That action, however, would not honestly reflect my considered judgment concerning the relative importance of the conflicting interests that are at stake. I remain persuaded that the considerations identified in my opinion in *Texas* v. *Johnson* are of controlling importance in these cases as well.

Accordingly, I respectfully dissent.

ALABAMA *v.* WHITE

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

No. 89–789. Argued April 17, 1990—Decided June 11, 1990

Police received an anonymous telephone tip that respondent White would be leaving a particular apartment at a particular time in a particular vehicle, that she would be going to a particular motel, and that she would be in possession of cocaine. They immediately proceeded to the apartment building, saw a vehicle matching the caller's description, observed White as she left the building and entered the vehicle, and followed her along the most direct route to the motel, stopping her vehicle just short of the motel. A consensual search of the vehicle revealed marijuana and, after White was arrested, cocaine was found in her purse. The Court of Criminal Appeals of Alabama reversed her conviction on possession charges, holding that the trial court should have suppressed the marijuana and cocaine because the officers did not have the reasonable suspicion necessary under *Terry* v. *Ohio*, 392 U. S. 1, to justify the investigatory stop of the vehicle.

Held: The anonymous tip, as corroborated by independent police work, exhibited sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop. Pp. 328–332.

(a) Under *Adams* v. *Williams*, 407 U. S. 143, 147, an informant's tip may carry sufficient "indicia of reliability" to justify a *Terry* stop even though it may be insufficient to support an arrest or search warrant. Moreover, *Illinois* v. *Gates*, 462 U. S. 213, 230, adopted a "totality of the circumstances" approach to determining whether an informant's tip establishes probable cause, whereby the informant's veracity, reliability, and basis of knowledge are highly relevant. These factors are also relevant in the reasonable-suspicion context, although allowance must be made in applying them for the lesser showing required to meet that standard. Pp. 328–329.

(b) Standing alone, the tip here is completely lacking in the necessary indicia of reliability, since it provides virtually nothing from which one might conclude that the caller is honest or his information reliable and gives no indication of the basis for his predictions regarding White's criminal activities. See *Gates*, *supra*, at 227. However, although it is a close question, the totality of the circumstances demonstrates that significant aspects of the informant's story were sufficiently corroborated by the police to furnish reasonable suspicion. Although not every detail

mentioned by the tipster was verified—*e. g.*, the name of the woman leaving the apartment building or the precise apartment from which she left—the officers did corroborate that a woman left the building and got into the described vehicle. Given the fact that they proceeded to the building immediately after the call and that White emerged not too long thereafter, it also appears that her departure was within the timeframe predicted by the caller. Moreover, since her 4-mile route was the most direct way to the motel, but nevertheless involved several turns, the caller's prediction of her destination was significantly corroborated even though she was stopped before she reached the motel. Furthermore, the fact that the caller was able to predict her future behavior demonstrates a special familiarity with her affairs. Thus, there was reason to believe that the caller was honest and well informed, and to impart some degree of reliability to his allegation that White was engaged in criminal activity. See *id.*, at 244, 245. Pp. 329–332.

550 So. 2d 1074, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BLACKMUN, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 333.

Joseph G. L. Marston III, Assistant Attorney General of Alabama, argued the cause for petitioner. With him on the briefs were *Don Siegelman*, Attorney General, and *Stacy S. Houston*, *Rosa Hamlett Davis*, and *Andrew J. Segal*, Assistant Attorneys General.

David B. Byrne, Jr., by appointment of the Court, 493 U. S. 1054, argued the cause and filed a brief for respondent.*

JUSTICE WHITE delivered the opinion of the Court.

Based on an anonymous telephone tip, police stopped respondent's vehicle. A consensual search of the car revealed drugs. The issue is whether the tip, as corroborated by in-

*Briefs of *amici curiae* were filed for the American Civil Liberties Union et al. by *Steven R. Shapiro* and *David I. Schoen;* and for Americans for Effective Law Enforcement, Inc., et al. by *Gregory U. Evans*, *Daniel B. Hales*, *Joseph A. Morris*, *George D. Webster*, *Fred E. Inbau*, *Wayne W. Schmidt*, *Bernard J. Farber*, *William K. Lambie*, and *James P. Manak*.

dependent police work, exhibited sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop. We hold that it did.

On April 22, 1987, at approximately 3 p.m., Corporal B. H. Davis of the Montgomery Police Department received a telephone call from an anonymous person, stating that Vanessa White would be leaving 235–C Lynwood Terrace Apartments at a particular time in a brown Plymouth station wagon with the right taillight lens broken, that she would be going to Dobey's Motel, and that she would be in possession of about an ounce of cocaine inside a brown attaché case. Corporal Davis and his partner, Corporal P. A. Reynolds, proceeded to the Lynwood Terrace Apartments. The officers saw a brown Plymouth station wagon with a broken right taillight in the parking lot in front of the 235 building. The officers observed respondent leave the 235 building, carrying nothing in her hands, and enter the station wagon. They followed the vehicle as it drove the most direct route to Dobey's Motel. When the vehicle reached the Mobile Highway, on which Dobey's Motel is located, Corporal Reynolds requested a patrol unit to stop the vehicle. The vehicle was stopped at approximately 4:18 p.m., just short of Dobey's Motel. Corporal Davis asked respondent to step to the rear of her car, where he informed her that she had been stopped because she was suspected of carrying cocaine in the vehicle. He asked if they could look for cocaine, and respondent said they could look. The officers found a locked brown attaché case in the car, and, upon request, respondent provided the combination to the lock. The officers found marijuana in the attaché case and placed respondent under arrest. During processing at the station, the officers found three milligrams of cocaine in respondent's purse.

Respondent was charged in Montgomery County Court with possession of marijuana and possession of cocaine. The trial court denied respondent's motion to suppress, and she pleaded guilty to the charges, reserving the right to appeal

the denial of her suppression motion. The Court of Criminal Appeals of Alabama held that the officers did not have the reasonable suspicion necessary under *Terry* v. *Ohio*, 392 U. S. 1 (1968), to justify the investigatory stop of respondent's car, and that the marijuana and cocaine were fruits of respondent's unconstitutional detention. The court concluded that respondent's motion to dismiss should have been granted and reversed her conviction. 550 So. 2d 1074 (1989). The Supreme Court of Alabama denied the State's petition for writ of certiorari, two justices dissenting. 550 So. 2d 1081 (1989). Because of differing views in the state and federal courts over whether an anonymous tip may furnish reasonable suspicion for a stop, we granted the State's petition for certiorari, 493 U. S. 1042 (1990). We now reverse.

Adams v. *Williams*, 407 U. S. 143 (1972), sustained a *Terry* stop and frisk undertaken on the basis of a tip given in person by a known informant who had provided information in the past. We concluded that, while the unverified tip may have been insufficient to support an arrest or search warrant, the information carried sufficient "indicia of reliability" to justify a forcible stop. 407 U. S., at 147. We did not address the issue of anonymous tips in *Adams*, except to say that "[t]his is a stronger case than obtains in the case of an anonymous telephone tip," *id.*, at 146.

Illinois v. *Gates*, 462 U. S. 213 (1983), dealt with an anonymous tip in the probable-cause context. The Court there abandoned the "two-pronged test" of *Aguilar* v. *Texas*, 378 U. S. 108 (1964), and *Spinelli* v. *United States*, 393 U. S. 410 (1969), in favor of a "totality of the circumstances" approach to determining whether an informant's tip establishes probable cause. *Gates* made clear, however, that those factors that had been considered critical under *Aguilar* and *Spinelli*—an informant's "veracity," "reliability," and "basis of knowledge"—remain "highly relevant in determining the value of his report." 462 U. S., at 230. These factors are also relevant in the reasonable-suspicion context, although al-

lowance must be made in applying them for the lesser showing required to meet that standard.

The opinion in *Gates* recognized that an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity inasmuch as ordinary citizens generally do not provide extensive recitations of the basis of their everyday observations and given that the veracity of persons supplying anonymous tips is "by hypothesis largely unknown, and unknowable." *Id.*, at 237. This is not to say that an anonymous caller could never provide the reasonable suspicion necessary for a *Terry* stop. But the tip in *Gates* was not an exception to the general rule, and the anonymous tip in this case is like the one in *Gates:* "[It] provides virtually nothing from which one might conclude that [the caller] is either honest or his information reliable; likewise, the [tip] gives absolutely no indication of the basis for the [caller's] predictions regarding [Vanessa White's] criminal activities." 462 U. S., at 227. By requiring "[s]omething more," as *Gates* did, *ibid.*, we merely apply what we said in *Adams:* "Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized," 407 U. S., at 147. Simply put, a tip such as this one, standing alone, would not "'warrant a man of reasonable caution in the belief' that [a stop] was appropriate." *Terry, supra*, at 22, quoting *Carroll* v. *United States*, 267 U. S. 132, 162 (1925).

As there was in *Gates*, however, in this case there is more than the tip itself. The tip was not as detailed, and the corroboration was not as complete, as in *Gates*, but the required degree of suspicion was likewise not as high. We discussed the difference in the two standards last Term in *United States* v. *Sokolow*, 490 U. S. 1, 7 (1989):

> "The officer [making a *Terry* stop] . . . must be able to articulate something more than an 'inchoate and unparticularized suspicion or "hunch."' [*Terry*, 392 U. S.,] at 27. The Fourth Amendment requires 'some minimal

level of objective justification' for making the stop. *INS* v. *Delgado*, 466 U. S. 210, 217 (1984). That level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence. We have held that probable cause means 'a fair probability that contraband or evidence of a crime will be found,' [*Gates*, 462 U. S., at 238], and the level of suspicion required for a *Terry* stop is obviously less demanding than for probable cause."

Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause. *Adams* v. *Williams*, *supra*, demonstrates as much. We there assumed that the unverified tip from the known informant might not have been reliable enough to establish probable cause, but nevertheless found it sufficiently reliable to justify a *Terry* stop. 407 U. S., at 147. Reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability. Both factors—quantity and quality—are considered in the "totality of the circumstances—the whole picture," *United States* v. *Cortez*, 449 U. S. 411, 417 (1981), that must be taken into account when evaluating whether there is reasonable suspicion. Thus, if a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable. The *Gates* Court applied its totality-of-the-circumstances approach in this manner, taking into account the facts known to the officers from personal observation, and giving the anonymous tip the weight it deserved in light of its indicia of reliability as established through independent police work. The same approach applies in the reasonable-suspicion context, the only differ-

ence being the level of suspicion that must be established. Contrary to the court below, we conclude that when the officers stopped respondent, the anonymous tip had been sufficiently corroborated to furnish reasonable suspicion that respondent was engaged in criminal activity and that the investigative stop therefore did not violate the Fourth Amendment.

It is true that not every detail mentioned by the tipster was verified, such as the name of the woman leaving the building or the precise apartment from which she left; but the officers did corroborate that a woman left the 235 building and got into the particular vehicle that was described by the caller. With respect to the time of departure predicted by the informant, Corporal Davis testified that the caller gave a particular time when the woman would be leaving, App. 5, but he did not state what that time was. He did testify that, after the call, he and his partner proceeded to the Lynwood Terrace Apartments to put the 235 building under surveillance, *id.*, at 5–6. Given the fact that the officers proceeded to the indicated address immediately after the call and that respondent emerged not too long thereafter, it appears from the record before us that respondent's departure from the building was within the timeframe predicted by the caller. As for the caller's prediction of respondent's destination, it is true that the officers stopped her just short of Dobey's Motel and did not know whether she would have pulled in or continued past it. But given that the 4-mile route driven by respondent was the most direct route possible to Dobey's Motel, 550 So. 2d, at 1075, Tr. of Oral Arg. 24, but nevertheless involved several turns, App. 7, Tr. of Oral Arg. 24, we think respondent's destination was significantly corroborated.

The Court's opinion in *Gates* gave credit to the proposition that because an informant is shown to be right about some things, he is probably right about other facts that he has alleged, including the claim that the object of the tip is engaged in criminal activity. 462 U. S., at 244. Thus, it is not

unreasonable to conclude in this case that the independent corroboration by the police of significant aspects of the informer's predictions imparted some degree of reliability to the other allegations made by the caller.

We think it also important that, as in *Gates*, "the anonymous [tip] contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted." *Id.*, at 245. The fact that the officers found a car precisely matching the caller's description in front of the 235 building is an example of the former. Anyone could have "predicted" that fact because it was a condition presumably existing at the time of the call. What was important was the caller's ability to predict respondent's *future behavior*, because it demonstrated inside information—a special familiarity with respondent's affairs. The general public would have had no way of knowing that respondent would shortly leave the building, get in the described car, and drive the most direct route to Dobey's Motel. Because only a small number of people are generally privy to an individual's itinerary, it is reasonable for police to believe that a person with access to such information is likely to also have access to reliable information about that individual's illegal activities. See *ibid.* When significant aspects of the caller's predictions were verified, there was reason to believe not only that the caller was honest but also that he was well informed, at least well enough to justify the stop.

Although it is a close case, we conclude that under the totality of the circumstances the anonymous tip, as corroborated, exhibited sufficient indicia of reliability to justify the investigatory stop of respondent's car. We therefore reverse the judgment of the Court of Criminal Appeals of Alabama and remand the case for further proceedings not inconsistent with this opinion.

So ordered.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

Millions of people leave their apartments at about the same time every day carrying an attaché case and heading for a destination known to their neighbors. Usually, however, the neighbors do not know what the briefcase contains. An anonymous neighbor's prediction about somebody's time of departure and probable destination is anything but a reliable basis for assuming that the commuter is in possession of an illegal substance—particularly when the person is not even carrying the attaché case described by the tipster.

The record in this case does not tell us how often respondent drove from the Lynwood Terrace Apartments to Dobey's Motel; for all we know, she may have been a room clerk or telephone operator working the evening shift. It does not tell us whether Officer Davis made any effort to ascertain the informer's identity, his reason for calling, or the basis of his prediction about respondent's destination. Indeed, for all that this record tells us, the tipster may well have been another police officer who had a "hunch" that respondent might have cocaine in her attaché case.

Anybody with enough knowledge about a given person to make her the target of a prank, or to harbor a grudge against her, will certainly be able to formulate a tip about her like the one predicting Vanessa White's excursion. In addition, under the Court's holding, every citizen is subject to being seized and questioned by any officer who is prepared to testify that the warrantless stop was based on an anonymous tip predicting whatever conduct the officer just observed. Fortunately, the vast majority of those in our law enforcement community would not adopt such a practice. But the Fourth Amendment was intended to protect the citizen from the overzealous and unscrupulous officer as well as from those who are conscientious and truthful. This decision makes a mockery of that protection.

I respectfully dissent.

PERPICH, GOVERNOR OF MINNESOTA, ET AL. *v.* DEPARTMENT OF DEFENSE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 89–542. Argued March 27, 1990—Decided June 11, 1990

Since 1933, federal law has provided that persons enlisting in a State National Guard unit simultaneously enlist in the National Guard of the United States, a part of the Army. The enlistees retain their status as State Guard members unless and until ordered to active federal duty and revert to state status upon being relieved from federal service. The authority to order the Guard to federal duty was limited to periods of national emergency until 1952, when Congress broadly authorized orders "to active duty or active duty for training" without any emergency requirement, but provided that such orders could not be issued without the consent of the governor of the State concerned. After two State Governors refused to consent to federal training missions abroad for their Guard units, the gubernatorial consent requirement was partially repealed in 1986 by the "Montgomery Amendment," which provides that a governor cannot withhold consent with regard to active duty outside the United States because of any objection to the location, purpose, type, or schedule of such duty. The Governor of Minnesota and the State of Minnesota (hereinafter collectively referred to as the Governor) filed a complaint for injunctive relief, alleging, *inter alia*, that the Montgomery Amendment had prevented him from withholding his consent to a 1987 federal training mission in Central America for certain members of the State Guard, and that the Amendment violates the Militia Clauses of Article I, § 8, of the Constitution, which authorize Congress to provide for (1) calling forth the militia to execute federal law, suppress insurrections, and repel invasions, and (2) organizing, arming, disciplining, and governing such part of the militia as may be employed in the federal service, reserving to the States the appointment of officers and the power to train the militia according to the discipline prescribed by Congress. The District Court rejected the Governor's challenge, holding that the Federal Guard was created pursuant to Congress' Article I, § 8, power to raise and support armies; that the fact that Guard units also have an identity as part of the state militia does not limit Congress' plenary authority to train the units as it sees fit when the Guard is called to active federal service; and that, accordingly, the Constitution neither required the gubernatorial veto nor prohibited its withdrawal. The Court of Appeals affirmed.

Held: Article I's plain language, read as a whole, establishes that Congress may authorize members of the National Guard of the United States to be ordered to active federal duty for purposes of training outside the United States without either the consent of a State Governor or the declaration of a national emergency. Pp. 347–355.

(a) The unchallenged validity of the dual enlistment system means that Guard members lose their state status when called to active federal duty, and, if that duty is a training mission, the training is performed by the Army. During such periods, the second Militia Clause is no longer applicable. Pp. 347–349.

(b) This view of the constitutional issue was presupposed by the *Selective Draft Law Cases*, 245 U. S. 366, 375, 377, 381–384, which held that the Militia Clauses do not constrain Congress' Article I, § 8, powers to provide for the common defense, raise and support armies, make rules for the governance of the Armed Forces, and enact necessary and proper laws for such purposes, but in fact provide additional grants of power to Congress. Pp. 349–351.

(c) This interpretation merely recognizes the supremacy of federal power in the military affairs area and does not significantly affect either the State's basic training responsibility or its ability to rely on its own Guard in state emergency situations. Pp. 351–352.

(d) In light of the exclusivity of federal power over many aspects of military affairs, see *Tarble's Case*, 13 Wall. 397, the powers allowed to the States by existing statutes are significant. Pp. 353–354.

(e) Thus, the Montgomery Amendment is not inconsistent with the Militia Clauses. Since the original gubernatorial veto was not constitutionally compelled, its partial repeal by the Amendment is constitutionally valid. Pp. 354–355.

880 F. 2d 11, affirmed.

STEVENS, J., delivered the opinion for a unanimous Court.

John R. Tunheim, Chief Deputy Attorney General of Minnesota, argued the cause for petitioners. With him on the briefs were *Hubert H. Humphrey III*, Attorney General, and *Peter M. Ackerberg*, Special Assistant Attorney General.

Solicitor General Starr argued the cause for respondents. With him on the brief were *Assistant Attorney General Gerson*, *Deputy Solicitor General Merrill*, *James A. Feldman*, and *Anthony J. Steinmeyer*.*

**James M. Shannon*, Attorney General of Massachusetts, and *Douglas H. Wilkins* and *Eric Mogilnicki*, Assistant Attorneys General, *Thomas J. Miller*, Attorney General of Iowa, *James E. Tierney*, Attorney General of

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether the Congress may authorize the President to order members of the National Guard to active duty for purposes of training outside the United States during peacetime without either the consent of a State Governor or the declaration of a national emergency.

A gubernatorial consent requirement that had been enacted in 1952[1] was partially repealed in 1986 by the "Montgomery Amendment," which provides:

Maine, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, and *Jeffrey Amestoy*, Attorney General of Vermont, filed a brief for the State of Iowa et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the National Guard Association of the United States et al. by *Stephen M. Shapiro* and *Michael K. Kellogg*, and by the Attorneys General for their respective States as follows: *Don Siegelman* of Alabama, *Douglas B. Baily* of Alaska, *Charles M. Oberly III* of Delaware, *Robert A. Butterworth* of Florida, *Michael J. Bowers* of Georgia, *Jim Jones* of Idaho, *Linley E. Pearson* of Indiana, *Robert T. Stephan* of Kansas, *William J. Guste, Jr.*, of Louisiana, *J. Joseph Curran, Jr.*, of Maryland, *Mike Moore* of Mississippi, *William L. Webster* of Missouri, *Brian McKay* of Nevada, *Hal Stratton* of New Mexico, *Lacy H. Thornburg* of North Carolina, *Robert H. Henry* of Oklahoma, *T. Travis Medlock* of South Carolina, *Roger A. Tellinghuisen* of South Dakota, *Charles W. Burson* of Tennessee, *R. Paul Van Dam* of Utah, *Mary Sue Terry* of Virginia, *Donald J. Hanaway* of Wisconsin, and *Joseph B. Meyer* of Wyoming; for the Firearms Civil Rights Legal Defense Fund by *Stephen P. Halbrook* and *Robert Dowlut;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo*, *Paul D. Kamenar*, and *John C. Scully*.

[1] The Armed Forces Reserve Act of 1952, provided in part:

"Sec. 101. When used in this Act—

. . . . . .

"(c) 'Active duty for training' means full-time duty in the active military service of the United States for training purposes." 66 Stat. 481.

"[Section 233] (c) At any time, any unit and the members thereof, or any member not assigned to a unit organized for the purpose of serving as such, in an active status in any reserve component may, by competent authority, be ordered to and required to perform active duty or active duty for training, without his consent, for not to exceed fifteen days annually: *Provided*, That units and members of the National Guard of the United States or the

> "The consent of a Governor described in subsections (b) and (d) may not be withheld (in whole or in part) with regard to active duty outside the United States, its territories, and its possessions, because of any objection to the location, purpose, type, or schedule of such active duty."[2]

In this litigation the Governor of Minnesota and the State of Minnesota (hereinafter collectively referred to as the Governor), challenge the constitutionality of that amendment. The Governor contends that it violates the Militia Clauses of the Constitution.[3]

Air National Guard of the United States shall not be ordered to or required to serve on active duty in the service of the United States pursuant to this subsection without the consent of the Governor of the State or Territory concerned, or the Commanding General of the District of Columbia National Guard.

"(d) A member of a reserve component may, by competent authority, be ordered to active duty or active duty for training at any time with his consent: *Provided*, That no member of the National Guard of the United States or Air National Guard of the United States shall be so ordered without the consent of the Governor or other appropriate authority of the State, Territory, or District of Columbia concerned." *Id.*, at 490.

These provisions, as amended, are now codified at 10 U. S. C. §§ 672(b) and 672(d).

[2] The Montgomery Amendment was enacted as § 522 of the National Defense Authorization Act for Fiscal Year 1987, Pub. L. 99–661, § 522, 100 Stat. 3871.

[3] Two clauses of Article I—clauses 15 and 16 of § 8—are commonly described as "the Militia Clause" or "the Militia Clauses." They provide:

"The Congress shall have Power . . .

. . . . . .

"To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

"To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."

In his complaint the Governor alleged that pursuant to a state statute the Minnesota National Guard is the organized militia of the State of Minnesota and that pursuant to a federal statute members of that militia "are also members of either the Minnesota unit of the Air National Guard of the United States or the Minnesota unit of the Army National Guard of the United States (hereinafter collectively referred to as the 'National Guard of the United States')." App. 5. The complaint further alleged that the Montgomery Amendment had prevented the Governor from withholding his consent to a training mission in Central America for certain members of the Minnesota National Guard in January 1987, and prayed for an injunction against the implementation of any similar orders without his consent.

The District Judge rejected the Governor's challenge. He explained that the National Guard consists of "two overlapping, but legally distinct, organizations. Congress, under its constitutional authority to 'raise and support armies' has created the National Guard of the United States, a federal organization comprised of state national guard units and their members." 666 F. Supp. 1319, 1320 (Minn. 1987).[4] The fact that these units also maintain an identity as

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[4] In addition to the powers granted by the Militia Clauses, n. 3, *supra*, Congress possesses the following powers conferred by Art. I, § 8:

"The Congress shall have Power . . . to pay the Debts and provide for the common Defence and general Welfare of the United States; . . .

. . . . . .

"To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

"To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

"To provide and maintain a Navy;

"To make Rules for the Government and Regulation of the land and naval Forces;

. . . . . .

"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Con-

State National Guards, part of the militia described in Art. I, § 8, of the Constitution, does not limit Congress' plenary authority to train the Guard "as it sees fit when the Guard is called to active federal service." *Id.*, at 1324. He therefore concluded that "the gubernatorial veto found in §§ 672(b) and 672(d) is not constitutionally required. Having created the gubernatorial veto as an accommodation to the states, rather than pursuant to a constitutional mandate, the Congress may withdraw the veto without violating the Constitution." *Ibid.*

A divided panel of the Court of Appeals for the Eighth Circuit reached a contrary conclusion. It read the Militia Clauses as preserving state authority over the training of the National Guard and its membership unless and until Congress "determined that there was some sort of exigency or extraordinary need to exert federal power." App. to Pet. for Cert. A92. Only in that event could the army power dissipate the authority reserved to the States under the Militia Clauses.

In response to a petition for rehearing en banc, the Court of Appeals vacated the panel decision and affirmed the judgment of the District Court. Over the dissent of two judges, the en banc court agreed with the District Court's conclusion that "Congress' army power is plenary and exclusive" and that the State's authority to train the militia did not conflict with congressional power to raise armies for the common defense and to control the training of federal reserve forces. 880 F. 2d 11, 17–18 (1989).

Because of the manifest importance of the issue, we granted the Governor's petition for certiorari. 493 U. S. 1017 (1990). In the end, we conclude that the plain language

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stitution in the Government of the United States, or in any Department or Officer thereof."

Moreover, Art. IV, § 4, provides:

"The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

of Article I of the Constitution, read as whole, requires affirmance of the Court of Appeals' judgment. We believe, however, that a brief description of the evolution of the present statutory scheme will help to explain that holding.

I

Two conflicting themes, developed at the Constitutional Convention and repeated in debates over military policy during the next century, led to a compromise in the text of the Constitution and in later statutory enactments. On the one hand, there was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of the separate States,[5] while, on the other hand, there was a recognition of the danger of relying on inadequately trained soldiers as the primary means of providing for the common defense.[6] Thus, Congress was authorized both to raise and support a national Army and also to organize "the Militia."

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[5] At the Virginia ratification convention, Edmund Randolph stated that "there was not a member in the federal Convention, who did not feel indignation" at the idea of a standing Army. 3 J. Elliot, Debates on the Federal Constitution 401 (1863).

[6] As Alexander Hamilton argued in the Federalist Papers:

"Here I expect we shall be told that the militia of the country is its natural bulwark, and would be at all times equal to the national defence. This doctrine, in substance, had like to have lost us our independence. It cost millions to the United States that might have been saved. The facts which, from our own experience, forbid a reliance of this kind, are too recent to permit us to be the dupes of such a suggestion. The steady operations of war against a regular and disciplined army can only be successfully conducted by a force of the same kind. Considerations of economy, not less than of stability and vigor, confirm this position. The American militia, in the course of the late war, have, by their valor on numerous occasions, erected eternal monuments to their fame; but the bravest of them feel and know that the liberty of their country could not have been established by their efforts alone, however great and valuable they were. War, like most other things, is a science to be acquired and perfected by diligence, by perseverance, by time, and by practice." The Federalist No. 25, pp. 156–157 (E. Earle ed. 1938).

In the early years of the Republic, Congress did neither. In 1792, it did pass a statute that purported to establish "an Uniform Militia throughout the United States," but its detailed command that every able-bodied male citizen between the ages of 18 and 45 be enrolled therein and equip himself with appropriate weaponry[7] was virtually ignored for more than a century, during which time the militia proved to be a decidedly unreliable fighting force.[8] The statute was finally repealed in 1901.[9] It was in that year that President Theodore Roosevelt declared: "Our militia law is obsolete and worthless."[10] The process of transforming "the National

[7] "That every citizen so enrolled and notified, shall, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball: or with a good rifle, knapsack, shot-pouch and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder; and shall appear, so armed, accoutred and provided, when called out to exercise, or into service, except, that when called out on company days to exercise only, he may appear without a knapsack." 1 Stat. 271.

[8] Wiener, The Militia Clause of the Constitution, 54 Harv. L. Rev. 181, 187–194 (1940).

[9] See 31 Stat. 748, 758.

[10] "Action should be taken in reference to the militia and to the raising of volunteer forces. Our militia law is obsolete and worthless. The organization and armament of the National Guard of the several States, which are treated as militia in the appropriations by the Congress, should be made identical with those provided for the regular forces. The obligations and duties of the Guard in time of war should be carefully defined, and a system established by law under which the method of procedure of raising volunteer forces should be prescribed in advance. It is utterly impossible in the excitement and haste of impending war to do this satisfactorily if the arrangements have not been made long beforehand. Provision should be made for utilizing in the first volunteer organizations called out the training of those citizens who have already had experience under arms, and especially for the selection in advance of the officers of any force which may be raised; for careful selection of the kind necessary is impossible after the outbreak of war." First Annual Message to Congress, Dec. 3, 1901, 14 Messages and Papers of the Presidents 6672.

Guard of the several States" into an effective fighting force then began.

The Dick Act divided the class of able-bodied male citizens between 18 and 45 years of age into an "organized militia" to be known as the National Guard of the several States, and the remainder of which was then described as the "reserve militia," and which later statutes have termed the "unorganized militia." The statute created a table of organization for the National Guard conforming to that of the Regular Army, and provided that federal funds and Regular Army instructors should be used to train its members.[11] It is undisputed that Congress was acting pursuant to the Militia Clauses of the Constitution in passing the Dick Act. Moreover, the legislative history of that Act indicates that Congress contemplated that the services of the organized militia would "be rendered only upon the soil of the United States or of its Territories." H. R. Rep. No. 1094, 57th Cong., 1st Sess., 22 (1902). In 1908, however, the statute was amended to pro-

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[11] The Act of January 21, 1903, 32 Stat. 775, provided in part:

"That the militia shall consist of every able-bodied male citizen of the respective States, Territories, and the District of Columbia, and every able-bodied male of foreign birth who has declared his intention to become a citizen, who is more than eighteen and less than forty-five years of age, and shall be divided into two classes—the organized militia, to be known as the National Guard of the State, Territory, or District of Columbia, or by such other designations as may be given them by the laws of the respective States or Territories, and the remainder to be known as the Reserve Militia."

Section 3 of the 1903 Act provided in part:

"That the regularly enlisted, organized, and uniformed active militia in the several States and Territories and the District of Columbia who have heretofore participated or shall hereafter participate in the apportionment of the annual appropriation provided by section sixteen hundred and sixty-one of the Revised Statutes of the United States, as amended, whether known and designated as National Guard, militia, or otherwise, shall constitute the organized militia." *Ibid.*

Section 4 of the 1903 Act authorized the President to call forth the militia for a period not exceeding nine months. *Id.*, at 776.

vide expressly that the Organized Militia should be available for service "either within or without the territory of the United States."[12]

When the Army made plans to invoke that authority by using National Guard units south of the Mexican border, Attorney General Wickersham expressed the opinion that the Militia Clauses precluded such use outside the Nation's borders.[13] In response to that opinion and to the widening conflict in Europe, in 1916 Congress decided to "federalize" the National Guard.[14] In addition to providing for greater federal control and federal funding of the Guard, the statute required every guardsman to take a dual oath—to support the Nation as well as the States and to obey the President as well as the Governor—and authorized the President to draft members of the Guard into federal service. The statute expressly provided that the Army of the United States should include not only "the Regular Army," but also "the National

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[12] Section 4, 35 Stat. 400.

[13] "It is certain that it is only upon one or more of these three occasions—when it is necessary to suppress insurrections, repel invasions, or to execute the laws of the United States—that even Congress can call this militia into the service of the United States, or authorize it to be done." 29 Op. Atty. Gen. 322, 323–324 (1912).

"The plain and certain meaning and effect of this constitutional provision is to confer upon Congress the power to call out the militia 'to execute the laws of the Union' within our own borders where, and where only, they exist, have any force, or can be executed by any one. This confers no power to send the militia into a foreign country to execute our laws which have no existence or force there and can not be there executed." *Id.*, at 327.

Under Attorney General Wickersham's analysis, it would apparently be unconstitutional to call forth the militia for training duty outside the United States, even with the consent of the appropriate Governor. Of course, his opinion assumed that the militia units so called forth would retain their separate status in the state militia during their period of federal service.

[14] See Wiener, 54 Harv. L. Rev., at 199–203.

Guard while in the service of the United States,"[15] and that when drafted into federal service by the President, members of the Guard so drafted should "from the date of their draft, stand discharged from the militia, and shall from said date be subject to" the rules and regulations governing the Regular Army. § 111, 39 Stat. 211.

During World War I, the President exercised the power to draft members of the National Guard into the Regular Army. That power, as well as the power to compel civilians to render military service, was upheld in the *Selective Draft Law Cases*, 245 U. S. 366 (1918).[16] Specifically, in those cases, and in *Cox* v. *Wood*, 247 U. S. 3 (1918), the Court held that the plenary power to raise armies was "not qualified or restricted by the provisions of the militia clause."[17]

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[15] The National Defense Act of June 3, 1916, 39 Stat. 166, provided in part:

"That the Army of the United States shall consist of the Regular Army, the Volunteer Army, the Officers' Reserve Corps, the Enlisted Reserve Corps, the National Guard while in the service of the United States, and such other land forces as are now or may hereafter be authorized by law."

[16] "The possession of authority to enact the statute must be found in the clauses of the Constitution giving Congress power 'to declare war; . . . to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; . . . to make rules for the government and regulation of the land and naval forces.' Article I, § 8. And of course the powers conferred by these provisions like all other powers given carry with them as provided by the Constitution the authority 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.' Article I, § 8." 245 U. S., at 377.

[17] "This result is apparent since on the face of the opinion delivered in those cases the constitutional power of Congress to compel the military service which the assailed law commanded was based on the following propositions: (a) That the power of Congress to compel military service and the duty of the citizen to render it when called for were derived from the authority given to Congress by the Constitution to declare war and to raise armies. (b) That those powers were not qualified or restricted by the provisions of the militia clause, and hence the authority in the exercise of the war power to raise armies and use them when raised was not subject to limitations as to use of the militia, if any, deduced from the militia

The draft of the individual members of the National Guard into the Army during World War I virtually destroyed the Guard as an effective organization. The draft terminated the members' status as militiamen, and the statute did not provide for a restoration of their prewar status as members of the Guard when they were mustered out of the Army. This problem was ultimately remedied by the 1933 amendments to the 1916 Act. Those amendments created the "two overlapping but distinct organizations" described by the District Court—the National Guard of the various States and the National Guard of the United States.

Since 1933 all persons who have enlisted in a State National Guard unit have simultaneously enlisted in the National Guard of the United States. In the latter capacity they became a part of the Enlisted Reserve Corps of the Army, but unless and until ordered to active duty in the Army, they retained their status as members of a separate State Guard unit. Under the 1933 Act, they could be ordered into active service whenever Congress declared a national emergency and authorized the use of troops in excess of those in the Regular Army. The statute plainly described the effect of such an order:

> "All persons so ordered into the active military service of the United States shall from the date of such order stand relieved from duty in the National Guard of their respective States, Territories, and the District of Columbia so long as they shall remain in the active military service of the United States, and during such time shall be subject

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clause. And (c) that from these principles it also follows that the power to call for military duty under the authority to declare war and raise armies and the duty of the citizen to serve when called were coterminous with the constitutional grant from which the authority was derived and knew no limit deduced from a separate, and for the purpose of the war power, wholly incidental, if not irrelevant and subordinate, provision concerning the militia, found in the Constitution. Our duty to affirm is therefore made clear." 247 U. S., at 6.

> to such laws and regulations for the government of the Army of the United States as may be applicable to members of the Army whose permanent retention in active military service is not contemplated by law. The organization of said units existing at the date of the order into active Federal service shall be maintained intact insofar as practicable." § 18, 48 Stat. 160–161.
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> "Upon being relieved from active duty in the military service of the United States all individuals and units shall thereupon revert to their National Guard status." *Id.*, at 161.

Thus, under the "dual enlistment" provisions of the statute that have been in effect since 1933, a member of the Guard who is ordered to active duty in the federal service is thereby relieved of his or her status in the State Guard for the entire period of federal service.

Until 1952 the statutory authority to order National Guard units to active duty was limited to periods of national emergency. In that year, Congress broadly authorized orders to "active duty or active duty for training" without any emergency requirement, but provided that such orders could not be issued without gubernatorial consent. The National Guard units have under this plan become a sizable portion of the Nation's military forces; for example, "the Army National Guard provides 46 percent of the combat units and 28 percent of the support forces of the Total Army."[18] Apparently gubernatorial consents to training missions were routinely obtained until 1985, when the Governor of California refused to consent to a training mission for 450 members of the California National Guard in Honduras, and the Governor of Maine shortly thereafter refused to consent to a similar mission. Those incidents led to the enactment of the Montgomery Amendment and this litigation ensued.

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[18] App. 12 (testimony of James H. Webb, Assistant Secretary of Defense for Reserve Affairs, before a subcommittee of the Senate Armed Services Committee on July 15, 1986).

II

The Governor's attack on the Montgomery Amendment relies in part on the traditional understanding that "the Militia" can only be called forth for three limited purposes that do not encompass either foreign service or nonemergency conditions, and in part on the express language in the second Militia Clause reserving to the States "the Authority of training the Militia." The Governor does not, however, challenge the authority of Congress to create a dual enlistment program.[19] Nor does the Governor claim that membership in a State Guard unit—or any type of state militia—creates any sort of constitutional immunity from being drafted into the Federal Armed Forces. Indeed, it would be ironic to claim such immunity when every member of the Minnesota National Guard has voluntarily enlisted, or accepted a commission as an officer, in the National Guard of the United States and thereby become a member of the Reserve Corps of the Army.

The unchallenged validity of the dual enlistment system means that the members of the National Guard of Minnesota who are ordered into federal service with the National Guard of the United States lose their status as members of the state militia during their period of active duty. If that duty is a training mission, the training is performed by the Army in which the trainee is serving, not by the militia from which the member has been temporarily disassociated. "Each member of the Army National Guard of the United States or the Air National Guard of the United States who is ordered to active duty is relieved from duty in the National Guard of his State or Territory, or of Puerto Rico or the District of Columbia, as

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[19] "The dual enlistment system requires state National Guard members to simultaneously enroll in the National Guard of the United States (NGUS), a reserve component of the national armed forces. 10 U. S. C. §§ 101(11) and (13), 591(a), 3261, 8261; 32 U. S. C. §§ 101(5) and (7). It is an essential aspect of traditional military policy of the United States. 32 U. S. C. § 102. The State of Minnesota fully supports dual enlistment and has not challenged the concept in any respect." Reply Brief for Petitioners 9 (footnote omitted).

the case may be, from the effective date of his order to active duty until he is relieved from that duty." 32 U. S. C. § 325(a).

This change in status is unremarkable in light of the traditional understanding of the militia as a part-time, nonprofessional fighting force. In *Dunne* v. *People*, 94 Ill. 120 (1879), the Illinois Supreme Court expressed its understanding of the term "militia" as follows:

> "Lexicographers and others define militia, and so the common understanding is, to be 'a body of armed citizens trained to military duty, who may be called out in certain cases, but may not be kept on service like standing armies, in time of peace.' That is the case as to the active militia of this State. The men comprising it come from the body of the militia, and when not engaged at stated periods in drilling and other exercises, they return to their usual avocations, as is usual with militia, and are subject to call when the public exigencies demand it." *Id.*, at 138.

Notwithstanding the brief periods of federal service, the members of the State Guard unit continue to satisfy this description of a militia. In a sense, all of them now must keep three hats in their closets—a civilian hat, a state militia hat, and an army hat—only one of which is worn at any particular time. When the state militia hat is being worn, the "drilling and other exercises" referred to by the Illinois Supreme Court are performed pursuant to "the Authority of training the Militia according to the discipline prescribed by Congress," but when that hat is replaced by the federal hat, the second Militia Clause is no longer applicable.

This conclusion is unaffected by the fact that prior to 1952 Guard members were traditionally not ordered into active service in peacetime or for duty abroad. That tradition is at least partially the product of political debate and political

compromise, but even if the tradition were compelled by the text of the Constitution, its constitutional aspect is related only to service by State Guard personnel who retain their state affiliation during their periods of service. There now exists a wholly different situation, in which the state affiliation is suspended in favor of an entirely federal affiliation during the period of active duty.

This view of the constitutional issue was presupposed by our decision in the *Selective Draft Law Cases*, 245 U. S. 366 (1918). Although the Governor is correct in pointing out that those cases were decided in the context of an actual war, the reasoning in our opinion was not so limited. After expressly noting that the 1916 Act had incorporated members of the National Guard into the National Army, the Court held that the Militia Clauses do not constrain the powers of Congress "to provide for the common Defence," to "raise and support Armies," to "make Rules for the Government and Regulation of the land and naval Forces," or to enact such laws as "shall be necessary and proper" for executing those powers. *Id.*, at 375, 377, 381–384. The Court instead held that, far from being a limitation on those powers, the Militia Clauses are—as the constitutional text plainly indicates—additional grants of power to Congress.

The first empowers Congress to call forth the militia "to execute the Laws of the Union, suppress Insurrections and repel Invasions." We may assume that Attorney General Wickersham was entirely correct in reasoning that when a National Guard unit retains its status as a state militia, Congress could not "impress" the entire unit for any other purpose. Congress did, however, authorize the President to call forth the entire membership of the Guard into federal service during World War I, even though the soldiers who fought in France were not engaged in any of the three specified purposes. Membership in the militia did not exempt

them from a valid order to perform federal service, whether that service took the form of combat duty or training for such duty.[20] The congressional power to call forth the militia may in appropriate cases supplement its broader power to raise armies and provide for the common defense and general welfare, but it does not limit those powers.[21]

The second Militia Clause enhances federal power in three additional ways. First, it authorizes Congress to provide for "organizing, arming and disciplining the Militia." It is by congressional choice that the available pool of citizens has been formed into organized units. Over the years, Congress has exercised this power in various ways, but its current choice of a dual enlistment system is just as permissible as the 1792 choice to have the members of the militia arm themselves. Second, the Clause authorizes Congress to provide for governing such part of the militia as may be employed in the service of the United States. Surely this authority encompasses continued training while on active duty. Finally, although the appointment of officers "and the Authority of training the Militia" is reserved to the States respectively, that limitation is, in turn, limited by the words "according to the discipline prescribed by Congress." If the discipline required for effective service in the Armed Forces of a global power requires training in distant lands, or distant skies, Congress has the authority to provide it. The subordinate

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[20] See *Selective Draft Law Cases*, 245 U. S. 366, 382–389 (1918); *Cox* v. *Wood*, 247 U. S. 3, 6 (1918).

[21] Congress has by distinct statutes provided for activating the National Guard of the United States and for calling forth the militia, including the National Guards of the various States. See 10 U. S. C. §§ 672–675 (authorizing executive officials to order reserve forces, including the National Guard of the United States and the Air National Guard of the United States, to active duty); 10 U. S. C. §§ 331–333 (authorizing executive officials to call forth the militia of the States); 10 U. S. C. §§ 3500, 8500 (authorizing executive officials to call forth the National Guards of the various States). When the National Guard units of the States are called forth, the orders "shall be issued through the governors of the States." § 3500.

authority to perform the actual training prior to active duty in the federal service does not include the right to edit the discipline that Congress may prescribe for Guard members after they are ordered into federal service.

The Governor argues that this interpretation of the Militia Clauses has the practical effect of nullifying an important state power that is expressly reserved in the Constitution. We disagree. It merely recognizes the supremacy of federal power in the area of military affairs.[22] The Federal Government provides virtually all of the funding, the materiel, and the leadership for the State Guard units. The Minnesota unit, which includes about 13,000 members, is affected only slightly when a few dozen, or at most a few hundred, soldiers are ordered into active service for brief periods of time.[23] Neither the State's basic training responsibility, nor its ability to rely on its own Guard in state emergency situations, is significantly affected. Indeed, if the federal training mission were to interfere with the State Guard's capacity to respond to local emergencies, the Montgomery Amendment would permit the Governor to veto the proposed mission.[24] More-

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[22] This supremacy is evidenced by several constitutional provisions, especially the prohibition in Art. I, § 10, of the Constitution, which states:

"No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."

[23] According to the Governor, at most "only several hundred" of Minnesota's National Guard members "will be in federal training at any one time." Brief for Petitioners 41.

[24] The Montgomery Amendment deprives the Governors of the power to veto participation in a National Guard of the United States training mission on the basis of any objection to "the location, purpose, type, or schedule of such active duty." 10 U. S. C. § 672(f). Governors may withhold their consent on other grounds. The Governor and the United States agree that if the federalization of the Guard would interfere with the State Guard's ability to address a local emergency, that circumstance would be a

over, Congress has provided by statute that in addition to its National Guard, a State may provide and maintain at its own expense a defense force that is exempt from being drafted into the Armed Forces of the United States. See 32 U. S. C. § 109(c). As long as that provision remains in effect, there is no basis for an argument that the federal statutory scheme deprives Minnesota of any constitutional entitlement to a separate militia of its own.[25]

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valid basis for a gubernatorial veto. Brief for Petitioners 41; Brief for Respondents 9.

The Governor contends that the residual veto power is of little use. He predicates this argument, however, on a claim that the federal training program has so minimal an impact upon the State Guard that the veto is never necessary:

"Minnesota has approximately 13,000 members of the National Guard. At most, only several hundred will be in federal training at any one time. To suggest that a governor will ever be able to withhold consent under the Montgomery Amendment assumes (1) local emergencies can be adequately predicted in advance, and (2) a governor can persuade federal authorities that National Guard members designated for training are needed for state purposes when the overwhelming majority of the National Guard remains at home." Brief for Petitioners 41.

Under the interpretation of the Montgomery Amendment advanced by the federal parties, it seems that a governor might also properly withhold consent to an active duty order if the order were so intrusive that it deprived the State of the power to train its forces effectively for local service:

"Under the current statutory scheme, the States are assured of the use of their National Guard units for any legitimate state purpose. They are simply forbidden to use their control over the state National Guard to thwart federal use of the NGUS for national security and foreign policy objectives with which they disagree." Brief for Respondents 13.

[25] The Governor contends that the state defense forces are irrelevant to this case because they are not subject to being called forth by the National Government and therefore cannot be militia within the meaning of the Constitution. We are not, however, satisfied that this argument is persuasive. First, the immunity of those forces from impressment into the national service appears—if indeed they have any such immunity—to be the consequence of a purely statutory choice, and it is not obvious why that choice should alter the constitutional status of the forces allowed the States. Second, although we do not believe it necessary to resolve the

In light of the Constitution's more general plan for providing for the common defense, the powers allowed to the States by existing statutes are significant. As has already been mentioned, several constitutional provisions commit matters of foreign policy and military affairs to the exclusive control of the National Government.[26] This Court in *Tarble's Case*, 13 Wall. 397 (1872), had occasion to observe that the constitutional allocation of powers in this realm gave rise to a presumption that federal control over the Armed Forces was exclusive.[27] Were it not for the Militia Clauses, it might be

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issue, the Governor's construction of the relevant statute is subject to question. It is true that the state defense forces "may not be called, ordered, or drafted into the armed forces." 32 U. S. C. § 109(c). It is nonetheless possible that they are subject to call under 10 U. S. C. §§ 331–333, which distinguish the "militia" from the "armed forces," and which appear to subject all portions of the "militia"—organized or not—to call if needed for the purposes specified in the Militia Clauses. See n. 21, *supra*.

[26] See, *e. g.*, Art. I, § 8, cl. 11 (Congress' power to declare war); Art. I, § 10, cl. 1 (States forbidden to enter into treaties); Art. I, § 10, cl. 3 (States forbidden to keep troops in time of peace, enter into agreements with foreign powers, or engage in war absent imminent invasion); Art. II, § 3 (President shall receive ambassadors).

[27] In the course of holding that a Wisconsin court had no jurisdiction to issue a writ of habeas corpus to inquire into the validity of a soldier's enlistment in the United States Army, we observed:

"Now, among the powers assigned to the National government, is the power 'to raise and support armies,' and the power 'to provide for the government and regulation of the land and naval forces.' The execution of these powers falls within the line of its duties; and its control over the subject is plenary and exclusive. It can determine, without question from any State authority, how the armies shall be raised, whether by voluntary enlistment or forced draft, the age at which the soldier shall be received, and the period for which he shall be taken, the compensation he shall be allowed, and the service to which he shall be assigned. And it can provide the rules for the government and regulation of the forces after they are raised, define what shall constitute military offences, and prescribe their punishment. No interference with the execution of this power of the National government in the formation, organization, and government of its armies by any State officials could be permitted without greatly impairing

possible to argue on like grounds that the constitutional allocation of powers precluded the formation of organized state militia.[28] The Militia Clauses, however, subordinate any such structural inferences to an express permission while also subjecting state militia to express federal limitations.[29]

We thus conclude that the Montgomery Amendment is not inconsistent with the Militia Clauses. In so doing, we of course do not pass upon the relative virtues of the various political choices that have frequently altered the relationship between the Federal Government and the States in the field of military affairs. This case does not raise any question concerning the wisdom of the gubernatorial veto established

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the efficiency, if it did not utterly destroy, this branch of the public service." 13 Wall., at 408.

[28] See *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 318 (1936) ("The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality"); The Federalist No. 23, p. 143 (E. Earle ed. 1938) ("[I]t must be admitted . . . that there can be no limitation of that authority which is to provide for the defense and protection of the community, in any matter essential to its efficacy—that is, in any matter essential to the *formation*, *direction*, or *support* of the NATIONAL FORCES"); L. Henkin, Foreign Affairs and the Constitution 234–244 (1972) (discussing implied constitutional restrictions upon state policies related to foreign affairs); Comment, The Legality of Nuclear Free Zones, 55 U. Chi. L. Rev. 965, 991–997 (1988) (discussing implied constitutional restrictions upon state policies related to foreign affairs or the military).

[29] The powers allowed by statute to the States make it unnecessary for us to examine that portion of the *Selective Draft Law Cases*, 245 U. S. 366 (1918), in which we stated:

"[The Constitution left] under the sway of the States undelegated the control of the militia to the extent that such control was not taken away by the exercise by Congress of its power to raise armies. This did not diminish the military power or curb the full potentiality of the right to exert it but left an area of authority requiring to be provided for (the militia area) unless and until by the exertion of the military power of Congress that area had been circumscribed or totally disappeared." *Id.*, at 383.

in 1952 or of its partial repeal in 1986. We merely hold that because the former was not constitutionally compelled, the Montgomery Amendment is constitutionally valid.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

HOWLETT, A MINOR, BY AND THROUGH HOWLETT, HIS MOTHER, NATURAL GUARDIAN, AND NEXT FRIEND *v.* ROSE, AS SUPERINTENDENT OF SCHOOLS FOR PINELLAS COUNTY, FLORIDA, ET AL.

CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

No. 89–5383. Argued March 20, 1990—Decided June 11, 1990

State as well as federal courts have jurisdiction over suits brought pursuant to 42 U. S. C. § 1983, which creates a remedy for violations of federal rights committed by persons acting under color of state law. Petitioner, a former high school student, filed a § 1983 suit in a Florida Circuit Court seeking damages and injunctive relief against, *inter alios*, the local school board, alleging, among other things, that his federal constitutional rights were violated when his car was searched on school premises in violation of the Fourth and Fourteenth Amendments of the Federal Constitution and that he was suspended from classes without due process. The court held that it lacked jurisdiction over the board and dismissed the complaint against the board with prejudice, citing *Hill* v. *Department of Corrections*, 513 So. 2d 129, in which the State Supreme Court ruled that Florida's statutory waiver of sovereign immunity applied only to state-court tort actions and conferred a blanket immunity on state governmental entities from federal civil rights actions under § 1983 in state court. The District Court of Appeal affirmed the dismissal, holding that the availability of sovereign immunity in a § 1983 action brought in state court is a matter of state law, and that, under *Hill*, the statutory waiver of immunity did not apply.

Held: A state-law "sovereign immunity" defense is not available to a school board in a § 1983 action brought in a state court that otherwise has jurisdiction when such defense would not be available if the action were brought in a federal forum. Pp. 361–383.

(a) Since the defendant in *Hill* was a state agency protected from suit in federal court by the Eleventh Amendment, see *Quern* v. *Jordan*, 440 U. S. 332, 341, and thus was not a "person" within the meaning of § 1983, see *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58, *Hill*'s actual disposition, if not its language and reasoning, comports with *Will*, which established that the State and arms of the State, which have traditionally enjoyed Eleventh Amendment immunity, are not subject to suit under § 1983 in either federal or state court. However, in construing *Hill* to extend absolute immunity not only to the State and its arms but also to

municipalities, counties, and school districts which might otherwise be subject to suit under § 1983 in federal court, the District Court of Appeal's decision raises the concern that that court may be evading federal law and discriminating against federal causes of action. The adequacy of the state-law ground to support a judgment precluding litigation of the federal claim is a federal question, which this Court reviews *de novo*. See, *e. g.*, *James* v. *Kentucky*, 466 U. S. 341, 348–349. Pp. 361–366.

(b) Under the Supremacy Clause, state courts have a concurrent duty to enforce federal law according to their regular modes of procedure. See, *e. g.*, *Claflin* v. *Houseman*, 93 U. S. 130, 136–137. Such a court may not deny a federal right, when the parties and controversy are properly before it, in the absence of a "valid excuse." *Douglas* v. *New York, N. H. & H. R. Co.*, 279 U. S. 377, 387–389. An excuse that is inconsistent with or violates federal law is not a valid excuse: The Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source. See, *e. g.*, *Mondou* v. *New York, N. H. & H. R. Co.*, 223 U. S. 1, 57. A valid excuse may exist when a state court refuses jurisdiction because of a neutral state rule of judicial administration, see, *e. g.*, *Douglas*, *supra*, unless that rule is pre-empted by federal law, see *Felder* v. *Casey*, 487 U. S. 131. Pp. 367–375.

(c) The District Court of Appeal's refusal to entertain § 1983 actions against state entities such as school boards violates the Supremacy Clause. If that refusal amounts to the adoption of a substantive rule of decision that state agencies are not subject to liability under § 1983, it directly violates federal law, which makes governmental defendants that are not arms of the State liable for their constitutional violations under § 1983. See, *e. g.*, *St. Louis* v. *Praprotnik*, 485 U. S. 112, 121–122. Conduct by persons acting under color of state law which is wrongful under § 1983 cannot be immunized by state law even though the federal cause of action is being asserted in state court. See, *e. g.*, *Martinez* v. *California*, 444 U. S. 277, 284, and n. 8. If, on the other hand, the District Court of Appeal's decision meant that § 1983 claims are excluded from the category of tort claims that the Circuit Court could hear against a school board, it was no less violative of federal law. Cf. *Atlantic Coast Line R. Co.* v. *Burnette*, 239 U. S. 199, 201. The State has constituted the Circuit Court as a court of general jurisdiction, and it entertains state common-law and statutory claims against state entities in a variety of their capacities, as well as § 1983 actions against individual state officials. A state policy that declines jurisdiction over one discrete category of § 1983 claims, yet permits similar state-law actions against state defendants, can be based only on the rationale that such defendants should not be held liable for § 1983 violations. Thus, there is no neutral or valid excuse for the refusal to hear suits like petitioner's. Pp. 375–381.

(d) There is no merit to respondents' argument that a federal court has no power to compel a state court to entertain a claim over which it lacks jurisdiction under state law. The fact that a rule is denominated jurisdictional does not provide a state court an excuse to avoid the obligation to enforce federal law if the rule does not reflect the concerns of power over the person and competence over the subject matter that jurisdictional rules are designed to protect. Also meritless is respondents' contention that sovereign immunity is not a creature of state law, but of long-established legal principles that Congress did not intend to abrogate in enacting § 1983. Congress did take common-law principles into account in, *e. g.*, excluding States and arms of the State from the definition of "person," but individual States may not rely on their own common-law heritage to exempt from federal liability persons that Congress subjected to liability. Pp. 381–383.

537 So. 2d 706, reversed and remanded.

STEVENS, J., delivered the opinion for a unanimous Court.

Gardner W. Beckett, Jr., argued the cause for petitioner. With him on the briefs were *Steven R. Shapiro* and *Steven H. Steinglass*.

Charles Rothfeld argued the cause for respondents. On the brief was *Bruce P. Taylor*.*

JUSTICE STEVENS delivered the opinion of the Court.

Section 1 of the Civil Rights Act of 1871, Rev. Stat. § 1979, now codified as 42 U. S. C. § 1983, creates a remedy for violations of federal rights committed by persons acting under color of state law.[1] State courts as well as federal courts have jurisdiction over § 1983 cases. The question in

*Briefs of *amici curiae* urging affirmance were filed for the National Association of Counties et al. by *Benna Ruth Solomon* and *Charles Rothfeld;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Richard A. Samp*.

[1] Title 42 U. S. C. § 1983 provides in relevant part:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

this case is whether a state-law defense of "sovereign immunity" is available to a school board otherwise subject to suit in a Florida court even though such a defense would not be available if the action had been brought in a federal forum.

I

Petitioner, a former high school student, filed a complaint in the Circuit Court for Pinellas County, Florida, naming the School Board of Pinellas County and three school officials as defendants. He alleged that an assistant principal made an illegal search of his car while it was parked on school premises and that he was wrongfully suspended from regular classes for five days. Contending that the search and subsequent suspension violated rights under the Fourth and Fourteenth Amendments of the Federal Constitution and under similar provisions of the State Constitution, he prayed for damages and an order expunging any reference to the suspension from the school records.

Defendants filed a motion to dismiss on various grounds, including failure to exhaust state administrative remedies.[2] The school board also contended that the court was without jurisdiction to hear the federal claims—but not the state claims—because the Florida waiver-of-sovereign-immunity statute did not extend to claims based on § 1983. App. 13–14. The Circuit Court dismissed the complaint with prejudice, citing a state case requiring state-law challenges to be first presented to the District Court of Appeal and the Florida Supreme Court decision in *Hill* v. *Department of Corrections*, 513 So. 2d 129 (1987). App. 19.

The District Court of Appeal for the Second District affirmed the dismissal of petitioner's § 1983 claim against the

[2] The defendants did not call into question the school board's potential liability if the actions of the school officials violated the Constitution. The school board, of course, could only be held liable if, as a matter of state law, it had delegated final decisionmaking authority in this area to the school principal and assistant principal. See *St. Louis* v. *Praprotnik*, 485 U. S. 112, 123 (1988) (opinion of O'CONNOR, J.).

school board.[3] It held that the availability of sovereign immunity in a § 1983 action brought in state court is a matter of state law, and that Florida's statutory waiver of sovereign immunity did not apply to § 1983 cases. The court rejected the argument that whether a State has maintained its sovereign immunity from a § 1983 suit in its state courts is a question of federal law. It wrote:

> "[W]hen a section 1983 action is brought in *state* court, the sole question to be decided on the basis of *state* law is whether the state has waived its common law sovereign immunity to the extent necessary to allow a section 1983 action in state court. *Hill* holds that Florida has not so waived its sovereign immunity. We therefore do not reach appellant's second issue in this case, i. e., whether under *federal* law a Florida school board is immune from a section 1983 law. There is no question under Florida law that agencies of the state, including school boards and municipalities, are the beneficiaries of sovereign immunity." 537 So. 2d 706, 708 (1989) (emphasis in original).

The Court of Appeal acknowledged our holding in *Martinez* v. *California*, 444 U. S. 277 (1980), that a State cannot immunize an official from liability for injuries compensable under federal law. It held, however, that under *Hill* a State's invocation of a "state common law immunity from the use of its courts for suits against the state in those state courts" raised "purely a question of state law." 537 So. 2d, at 708. The Florida Supreme Court denied review. 545 So. 2d 1367 (1987). In view of the importance of the question decided by the Court of Appeal, we granted certiorari. 493 U. S. 963 (1989).

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[3] The parties did not brief, and the District Court of Appeal did not address, petitioner's claims under the State Constitution or against the individual defendants. See Brief for Petitioner 4, n. 5; Brief for Respondents 1–2.

II

The question in this case stems from the Florida Supreme Court's decision in the *Hill* case. In that case, the plaintiff sought damages for common-law negligence and false imprisonment and violations of his constitutional rights under § 1983 from the Florida Department of Corrections for the conduct of one of its probation supervisors. Hill argued that the department was a "person" under § 1983, that it was responsible for the actions of its supervisor, and that it was subject to suit in the Circuit Court pursuant to the Florida waiver of sovereign immunity. Fla. Stat. § 768.28 (1989).[4] That statute provides that the State and its subdivisions, including municipalities and school boards, § 768.28(2), are subject to suit in circuit court for tort claims "in the same manner and to the same extent as a private individual under like circumstances," § 768.28(5).[5] Although the terms of the waiver

[4] The statute expanded the protection of sovereign immunity in some respects and narrowed it in others. See *Cauley* v. *Jacksonville*, 403 So. 2d 379 (Fla. 1981). Before the passage of § 768.28, the doctrine had been cast into serious doubt. We have previously noted that Florida led the States in the abrogation of municipal immunity:

"The seminal opinion of the Florida Supreme Court in *Hargrove* v. *Town of Cocoa Beach*, 96 So. 2d 130 (1957), has spawned 'a minor avalanche of decisions repudiating municipal immunity,' which, in conjunction with legislative abrogation of sovereign immunity, has resulted in the consequence that only a handful of States still cling to the old common-law rule of immunity for governmental functions." *Owen* v. *City of Independence*, 445 U. S. 622, 646, n. 28 (1980) (citation omitted).

[5] Florida considered common-law sovereign immunity to be "jurisdictional." See, *e. g.*, *Schmauss* v. *Snoll*, 245 So. 2d 112 (App. 3d Dist. 1971). Since the enactment of the statute, several courts have held that sovereign immunity is jurisdictional, see, *e. g.*, *Kaisner* v. *Kolb*, 509 So. 2d 1213, 1215, n. 2 (App. 2d Dist. 1987), rev'd on other grounds, 543 So. 2d 732 (1989); *Sebring Utilities Comm'n* v. *Sicher*, 509 So. 2d 968, 969 (App. 2d Dist. 1987); *State Dept. of Highway Safety and Motor Vehicles* v. *Kropff*, 491 So. 2d 1252, 1254, n. 1 (App. 3d Dist. 1986), but at least one court has come to the opposite conclusion, see *Hutchins* v. *Mills*, 363 So. 2d 818, 821 (App. 1st Dist. 1978); see also *Penthouse, Inc.* v. *Saba*, 399 So. 2d 456, 458, n. 2 (App. 2d Dist. 1981) ("Discretionary acts do not give rise

could be read narrowly to restrict liability to claims against the State in its proprietary capacity, the Florida courts have rejected that interpretation.[6] In 16 cases arising under Florida statutory and common law, the State Supreme Court has held that the State may be sued in *respondeat superior* for the violation of nondiscretionary duties in the exercise of governmental authority. The Florida courts thus have entertained suits against state agencies for the violation of nondiscretionary duties committed in the performance of various governmental activities, including the roadside stop and arrest of an individual driving with an expired inspection sticker,[7] the negligent maintenance by city employees of a

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to liability because they are not tortious. By definition, one who has discretion to act has no duty to act").

The statute makes the State liable in *respondeat superior* and provides that no officer, employee, or agent of the State, acting in the scope of employment, may be held personally liable in tort or be named as a defendant unless that person "acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety or property." Fla. Stat. § 768.28(9)(a) (1989). Counsel for petitioner represented at oral argument that the individual defendants would be protected by the statute from a state tort law claim based on the actions involved in this case. Tr. of Oral Arg. 16.

[6] See, *e. g.*, *Department of Health and Rehabilitative Servs.* v. *Yamuni*, 529 So. 2d 258, 261 (Fla. 1988) ("We recede from any suggestion in *Reddish* that there has been no waiver of immunity for activities performed only by the government and not private persons. The only government activities for which there is no waiver of immunity are basic policy making decisions at the planning level"); *Commercial Carrier Corp.* v. *Indian River County*, 371 So. 2d 1010, 1016–1017 (Fla. 1979) (citing *Indian Towing Co.* v. *United States*, 350 U. S. 61, 64–65 (1955)). See also *Dunagan* v. *Seely*, 533 So. 2d 867, 869 (App. 1st Dist. 1988).

[7] See *Kaisner* v. *Kolb*, 543 So. 2d 732 (Fla. 1989). See also the statements in *Everton* v. *Willard*, 468 So. 2d 936, 938 (Fla. 1985) ("We recognize that, if a special relationship exists between an individual and a governmental entity, there could be a duty of care owed to the individual. This relationship is illustrated by the situation in which the police accept the responsibility to protect a particular person who has assisted them in the arrest or prosecution of criminal defendants and the individual is in

storm sewer system,[8] the failure of a state caseworker to detect and prevent child abuse,[9] the negligent maintenance of county swimming pools and failure to warn or correct known dangerous conditions,[10] and the failure to protect a prison inmate from other inmates known to be dangerous.[11] Hill ar-

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danger due to that assistance. In such a case, a special duty to use reasonable care in the protection of the individual may arise").

[8] See *Slemp* v. *North Miami*, 545 So. 2d 256 (Fla. 1989).

[9] See *Yamuni*, 529 So. 2d, at 261.

[10] See *Avallone* v. *Board of County Commissioners*, 493 So. 2d 1002 (Fla. 1986) (negligent maintenance of swimming pool); *State Department of Transportation* v. *Webb*, 438 So. 2d 780 (Fla. 1983); *Perez* v. *State Department of Transportation*, 435 So. 2d 830 (Fla. 1983); *St. Petersburg* v. *Collom*, 419 So. 2d 1082 (Fla. 1982); *A. L. Lewis Elementary School* v. *Metropolitan Dade County*, 376 So. 2d 32 (App. 3d Dist. 1979). The Florida courts will not entertain actions against the State for defects in the construction of a road or the decision to install or not to install traffic control devices in general not regulated by statute and "inherent in the overall plan." See *State Department of Transportation* v. *Neilson*, 419 So. 2d 1071, 1077–1078 (Fla. 1982); *Ingham* v. *State Department of Transportation*, 419 So. 2d 1081 (Fla. 1982); see also *Harrison* v. *Escambia County School Bd.*, 434 So. 2d 316, 320 (Fla. 1983) ("[T]he statutory words 'most reasonably safe locations available' have no fixed or readily ascertainable meaning and . . . in deciding on the location of a school bus stop a school board makes a policy or planning level decision").

[11] See *Dunagan* v. *Seely*, 533 So. 2d 867 (App. 1st Dist. 1988); *Green* v. *Inman*, 539 So. 2d 614 (App. 4th Dist. 1989); *Hutchinson* v. *Miller*, 548 So. 2d 883 (App. 5th Dist. 1989); see also *State Dept. of Health and Rehabilitative Servs.* v. *Whaley*, 531 So. 2d 723 (App. 4th Dist. 1988) (negligent failure to take care of juvenile delinquent). The circuit court also entertains actions against governmental entities for failure to supervise properly their staffs or warn of dangerous conditions in public parking lots and other facilities. See *Daniele* v. *Board of County Comm'rs*, 375 So. 2d 1 (App. 4th Dist. 1979); *State Department of Transportation* v. *Kennedy*, 429 So. 2d 1210 (App. 2d Dist. 1983) (maintenance of a sidewalk); *Pitts* v. *Metropolitan Dade County*, 374 So. 2d 996 (App. 3d Dist. 1978) (negligence of police officers in failing to supervise adequately a parking lot when the plaintiff is attacked by a third party).

The sovereign immunity statute preserves immunity only from claims based on the negligent exercise of discretionary judgment. See, *e. g.*, *Everton* v. *Willard*, 468 So. 2d 936 (Fla. 1985); *Reddish* v. *Smith*, 468 So.

gued that just as the State could be joined in an action for the violation of established state common-law or statutory duties, it was also subject to suit for violations of its nondiscretionary duty not to violate the Constitution. See *Owen* v. *City of Independence*, 445 U. S. 622, 649–650 (1980).

The trial court dismissed Hill's § 1983 claim but entered judgment on the jury's verdict in his favor on the common-law claims. On appeal, the District Court of Appeal affirmed the dismissal of the § 1983 claim and reversed the judgment on the common-law claim. It also certified to the Florida Supreme Court the question whether Florida's statutory waiver of sovereign immunity permitted suits against the State and its agencies under § 1983. *Department of Corrections* v. *Hill*, 490 So. 2d 118 (1986).

The State Supreme Court answered that question in the negative. *Hill* v. *Department of Corrections*, 513 So. 2d 129 (1987), cert. denied, 484 U. S. 1064 (1988). Without citing any of its own sovereign immunity cases and relying solely on analogy to the Eleventh Amendment and decisions of the courts of other States, the State Supreme Court held that the Florida statute conferred a blanket immunity on governmental entities from federal civil rights actions under § 1983. 513 So. 2d, at 133. It stated: "While Florida is at liberty to waive its immunity from section 1983 actions, it has not done so. The recovery ceilings in section 768.28 were intended to waive sovereign immunity for state tort actions, not federal civil rights actions commenced under section 1983." *Ibid.* The court thus affirmed the dismissal of the § 1983 claim but reversed the Court of Appeal's judgment on

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2d 929 (Fla. 1985); *Trianon Park Condominium Assn., Inc.* v. *Hialeah*, 468 So. 2d 912 (Fla. 1985). Such immunity does not extend to the violation of constitutional duties. See *Trianon Park*, 468 So. 2d, at 919 ("The judicial branch has no authority to interfere with the conduct of those [legislative] functions *unless they violate a constitutional or statutory provision*") (emphasis added).

the common-law claim and allowed the judgment for Hill on that claim to stand.

On its facts, the disposition of the *Hill* case would appear to be unexceptional. The defendant in *Hill* was a state agency protected from suit in a federal court by the Eleventh Amendment. See *Quern* v. *Jordan*, 440 U. S. 332, 341 (1979) (§ 1983 does not "override the traditional sovereign immunity of the States").[12] As we held last Term in *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58 (1989), an entity with Eleventh Amendment immunity is not a "person" within the meaning of § 1983. The anomaly identified by the State Supreme Court, and by the various state courts which it cited,[13] that a State might be forced to entertain in its own courts suits from which it was immune in federal court, is thus fully met by our decision in *Will*. *Will* establishes that the State and arms of the State, which have traditionally enjoyed Eleventh Amendment immunity, are not subject to suit under § 1983 in either federal court or state court.

The language and reasoning of the State Supreme Court, if not its precise holding, however, went further. That further step was completed by the District Court of Appeal in this case. As that court construed the law, Florida has extended

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[12] Prior to the Florida Supreme Court's decision in *Hill*, the United States Court of Appeals for the Eleventh Circuit had concluded that a state agency was protected from suit in federal court under § 1983 and that the waiver-of-immunity statute did not constitute a consent to suit in federal court. See *Gamble* v. *Florida Dept. of Health and Rehabilitative Servs.*, 779 F. 2d 1509 (1986).

[13] See *De Bleecker* v. *Montgomery County*, 292 Md. 498, 513, n. 4, 438 A. 2d 1348, 1356, n. 4 (1982); *Kapil* v. *Association of Pennsylvania State College and University Faculties*, 68 Pa. Commw. 287, 448 A. 2d 717 (1982), rev'd on other grounds, 504 Pa. 92, 470 A. 2d 482 (1983); *Karchefske* v. *Department of Mental Health*, 143 Mich. App. 1, 9–10, 371 N. W. 2d 876, 881–882 (1985); *Kristensen* v. *Strinden*, 343 N. W. 2d 67 (N. D. 1983); *Ramah Navajo School Board, Inc.* v. *Board of Revenue*, 104 N. M. 302, 720 P. 2d 1243 (App.), cert. denied, 479 U. S. 940 (1986); *Woodbridge* v. *Worcester State Hospital*, 384 Mass. 38, 44–45, n. 7, 423 N. E. 2d 782, 786, n. 7 (1981).

absolute immunity from suit not only to the State and its arms but also to municipalities, counties, and school districts that might otherwise be subject to suit under § 1983 in federal court. That holding raises the concern that the state court may be evading federal law and discriminating against federal causes of action. The adequacy of the state-law ground to support a judgment precluding litigation of the federal claim is itself a federal question which we review *de novo*. See *Johnson* v. *Mississippi*, 486 U. S. 578, 587 (1988); *James* v. *Kentucky*, 466 U. S. 341, 348–349 (1984); *Hathorn* v. *Lovorn*, 457 U. S. 255, 263 (1982); *Barr* v. *City of Columbia*, 378 U. S. 146, 149 (1964); *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 455 (1958); *Rogers* v. *Alabama*, 192 U. S. 226, 230–231 (1904); Hill, The Inadequate State Ground, 65 Colum. L. Rev. 943, 954–957 (1965). Whether the constitutional rights asserted by petitioner were "'given due recognition by the [Court of Appeal] is a question as to which the [petitioner is] entitled to invoke our judgment, and this [he has] done in the appropriate way. It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward nonfederal grounds of decision that were without any fair or substantial support.'" *Staub* v. *City of Baxley*, 355 U. S. 313, 318–319 (1958) (quoting *Ward* v. *Love County Board of Comm'rs*, 253 U. S. 17, 22 (1920)).[14]

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[14] We reject the suggestion of respondent's *amici*, see Brief for Washington Legal Foundation et al. as *Amici Curiae* 7, that we remand the case to the state court for further explanation. While we have followed that course when there was reason to believe that the state-court decision rested on unstated premises of state law, see *Employment Division, Dept. of Human Resources of Ore.* v. *Smith*, 485 U. S. 660, 673–674 (1988), we have long held that this Court has an independent obligation to ascertain whether a judgment defeating the enforcement of federal rights rests upon a valid nonfederal ground and whether that ground finds "fair or substantial support" in state law. See, *e. g.*, *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229, 234 (1969); *NAACP* v. *Alabama ex rel. Patterson*, 357

III

Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum—although both might well be true—but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws "the supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure. "The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. . . . The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent." *Claflin* v. *Houseman*, 93 U. S. 130, 136–137 (1876); see *Minneapolis & St. Louis R. Co.* v. *Bombolis*, 241 U. S. 211, 222 (1916) ("[T]he governments and courts of both the Nation and the several States [are not] strange or foreign to each other in the broad sense of that word, but [are] all courts of a common country, all within the orbit of their lawful authority being charged with the duty to safeguard and enforce the right of every citizen without reference to the

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U. S. 449, 454 (1958); *Broad River Power Co.* v. *South Carolina ex rel. Daniel*, 281 U. S. 537, 540 (1930). The reasons for that rule rest on nothing less than this Court's ultimate authority to review state-court decisions in which "any title, right, privilege, or immunity is specially set up or claimed under the Constitution." 28 U. S. C. § 1257(a); see *Martin* v. *Hunter's Lessee*, 1 Wheat. 304 (1816). "To hold otherwise would open an easy method of avoiding the jurisdiction of this court." *Terre Haute & Indianapolis R. Co.* v. *Indiana ex rel. Ketcham*, 194 U. S. 579, 589 (1904) (Holmes, J.).

particular exercise of governmental power from which the right may have arisen, if only the authority to enforce such right comes generally within the scope of the jurisdiction conferred by the government creating them"); Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489 (1954) ("The law which governs daily living in the United States is a single system of law"); see also *Tafflin* v. *Levitt*, 493 U. S. 455, 469 (1990) (SCALIA, J., concurring).[15] As Alexander Hamilton expressed the principle in a classic passage:

> "[I]n every case in which they were not expressly excluded by the future acts of the national legislature, [state courts] *will of course take cognizance of the causes to which those acts may give birth.* This I infer from the nature of judiciary power, and from the general genius of the system. The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation *between parties within its jurisdiction*, though the causes of dispute are relative to the laws of the most distant part of the globe.

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[15] See also *Worcester* v. *Georgia*, 6 Pet. 515, 571 (1832) (McLean, J.):

"It has been asserted that the federal government is foreign to the state governments; and that it must consequently be hostile to them. Such an opinion could not have resulted from a thorough investigation of the great principles which lie at the foundation of our system. The federal government is neither foreign to the state governments, nor is it hostile to them. It proceeds from the same people, and is as much under their control as the state governments.

"Where, by the Constitution, the power of legislation is exclusively vested in Congress, they legislate for the people of the Union, and their acts are as binding as are the constitutional enactments of a state legislature on the people of the state."

Congress, of course, may oust the state courts of their concurrent jurisdiction. See *Yellow Freight System, Inc.* v. *Donnelly*, 494 U. S. 820 (1990); *Tafflin* v. *Levitt*, 493 U. S. 455 (1990); *Houston* v. *Moore*, 5 Wheat. 1, 25–26 (1820).

> Those of Japan, not less than of New York, may furnish the objects of legal discussion to our courts. When in addition to this we consider the State governments and the national governments, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive, that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited." The Federalist No. 82, p. 132 (E. Bourne ed. 1947) (emphasis added).

Three corollaries follow from the proposition that "federal" law is part of the "Law of the Land" in the State:

1. A state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of "valid excuse." *Douglas* v. *New York, N. H. & H. R. Co.*, 279 U. S. 377, 387–388 (1929) (Holmes, J.).[16] "The ex-

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[16] See *Hathorn* v. *Lovorn*, 457 U. S. 255, 263 (1982); *Barr* v. *City of Columbia*, 378 U. S. 146, 149 (1964); *NAACP* v. *Alabama ex rel Patterson*, 357 U. S., at 455; *Rogers* v. *Alabama*, 192 U. S. 226, 230–231 (1904); *Eustis* v. *Bolles*, 150 U. S. 361 (1893); Hill, The Inadequate State Ground, 65 Colum. L. Rev. 943, 954–957 (1965).

To understand why this is so, one need only imagine a contrary system in which the Supremacy Clause operated as a constraint on the activity of state-court judges like that imposed on other state actors, rather than as a rule of decision. On that hypothesis, state courts would be subject to the ultimate superintendence of federal courts which would vacate judgments entered in violation of federal law, just as they might overturn unconstitutional state legislative or executive decisions. Federal courts would exercise a superior authority to enforce and apply the Constitution and laws passed pursuant to it. See Wechsler, The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review, 34 Wash. & Lee L. Rev. 1043, 1047 (1977) (describing, and rejecting, alternative view of Supremacy Clause, as intrusion on state autonomy).

The language of the Supremacy Clause—which directs that "the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding"—and our cases confirm that state courts have the coordinate authority and consequent

istence of the jurisdiction creates an implication of duty to exercise it." *Mondou* v. *New York, N. H. & H. R. Co.*, 223 U. S. 1, 58 (1912); see *Testa* v. *Katt*, 330 U. S. 386 (1947); *Missouri ex rel. St. Louis, B. & M. R. Co.* v. *Taylor*, 266 U. S. 200, 208 (1924); *Robb* v. *Connolly*, 111 U. S. 624, 637 (1884).[17]

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responsibility to enforce the supreme law of the land. Early in our history, in support of the Court's power of review over state courts, Justice Story anticipated that such courts "in the exercise of their ordinary jurisdiction . . . would incidentally take cognizance of cases arising under the constitution, the laws, and treaties of the United States," *Martin* v. *Hunter's Lessee*, 1 Wheat., at 342, and would decide federal questions even when, pleaded in replication, they were necessary to the plaintiff's case. *Id.*, at 340. The adequate-state-ground doctrine accords respect to state courts as decisionmakers by honoring their modes of procedure. The structure of our system of judicial review, the requirement that a federal question arising from a state case must first be presented to the state courts for decision, see, *e. g.*, *Cardinale* v. *Louisiana*, 394 U. S. 437 (1969); *State Farm Mutual Automobile Ins. Co.* v. *Duel*, 324 U. S. 154, 160–161 (1945); *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U. S. 430, 434 (1940), and the rule that a federal district court cannot entertain an original action alleging that a state court violated the Constitution by giving effect to an unconstitutional state statute, see *Rooker* v. *Fidelity Trust Co.*, 263 U. S. 413, 415–416 (1923) ("If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. . . . Unless and until so reversed or modified, it would be an effective and conclusive adjudication"); see also *District of Columbia Court of Appeals* v. *Feldman*, 460 U. S. 462, 476, 483–484, n. 16 (1983), all also presuppose that state courts presumptively have the obligation to apply federal law to a dispute before them and may not deny a federal right in the absence of a valid excuse.

[17] *Amici* argue that the obligation of state courts to enforce federal law rests, not on the Supremacy Clause, but on a presumption about congressional intent and that Congress should be explicit when it intends to make federal claims enforceable in state court. Brief for Washington Legal Foundation et al. as *Amici Curiae* 8–9, 13. The argument is strikingly similar to the argument that we addressed in *Minneapolis & St. Louis R. Co.* v. *Bombolis*, 241 U. S. 211 (1916), when we held that state courts need not comply with the Seventh Amendment in hearing a federal statutory claim. We rejected the argument that "state courts [had] become courts

2. An excuse that is inconsistent with or violates federal law is not a valid excuse: The Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source. "The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of [the State] as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State." *Mondou*, 223 U. S., at 57; see *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698, 703–704

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of the United States exercising a jurisdiction conferred by Congress, whenever the duty was cast upon them to enforce a Federal right." *Id.*, at 222. We reject it again today. We stated in *Bombolis:*

"It is true in the *Mondou Case* it was held that where the general jurisdiction conferred by the state law upon a state court embraced otherwise causes of action created by an act of Congress, it would be a violation of duty under the Constitution for the court to refuse to enforce the right arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers. But that ruling in no sense implied that the duty which was declared to exist on the part of the state court depended upon the conception that for the purpose of enforcing the right the state court was to be treated as a Federal court deriving its authority not from the State creating it, but from the United States. On the contrary the principle upon which the *Mondou Case* rested, while not questioning the diverse governmental sources from which state and national courts drew their authority, recognized the unity of the governments, national and state, and the common fealty of all courts, both state and national, to both state and national constitutions, and the duty resting upon them, when it was within the scope of their authority, to protect and enforce rights lawfully created, without reference to the particular government from whose exercise of lawful power the right arose." *Id.*, at 222–223.

See also *Tafflin* v. *Levitt*, 493 U. S., at 469–470 (SCALIA, J., concurring).

(1942) ("By virtue of the Constitution, the courts of the several states must remain open to such litigants on the same basis that they are open to litigants with causes of action springing from a different source"); *McKnett* v. *St. Louis & San Francisco R. Co.*, 292 U. S. 230, 233–234 (1934); *Minneapolis & St. Louis R. Co.* v. *Bombolis*, 241 U. S. 211 (1916); cf. *FERC* v. *Mississippi*, 456 U. S. 742, 776, n. 1 (1982) (opinion of O'CONNOR, J.) (State may not discriminate against federal causes of action).

3. When a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts, we must act with utmost caution before deciding that it is obligated to entertain the claim. See *Missouri ex rel. Southern R. Co.* v. *Mayfield*, 340 U. S. 1 (1950); *Georgia Rail Road & Banking Co.* v. *Musgrove*, 335 U. S. 900 (1949) *(per curiam)*; *Herb* v. *Pitcairn*, 324 U. S. 117 (1945); *Douglas* v. *New York, N. H. & H. R. Co.*, 279 U. S. 377 (1929). The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented. The general rule, "bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them." Hart, 54 Colum. L. Rev., at 508; see also *Southland Corp.* v. *Keating*, 465 U. S. 1, 33 (1984) (O'CONNOR, J., dissenting); *FERC* v. *Mississippi*, 456 U. S., at 774 (opinion of Powell, J.). The States thus have great latitude to establish the structure and jurisdiction of their own courts. See *Herb*, *supra*; *Bombolis*, *supra*; *Missouri* v. *Lewis*, 101 U. S. 22, 30–31 (1880). In addition, States may apply their own neutral procedural rules to federal claims, unless those rules are pre-empted by federal law. See *Felder* v. *Casey*, 487 U. S. 131 (1988); *James* v. *Kentucky*, 466 U. S., at 348.

These principles are fundamental to a system of federalism in which the state courts share responsibility for the applica-

tion and enforcement of federal law. In *Mondou*, for example, we held that rights under the Federal Employers' Liability Act (FELA) "may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion." 223 U. S., at 59. The Connecticut courts had declined cognizance of FELA actions because the policy of the federal Act was "not in accord with the policy of the State," and it was "inconvenient and confusing" to apply federal law. *Id.*, at 55–56. We noted, as a matter of some significance, that Congress had not attempted "to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure," *id.*, at 56, and found from the fact that the state court was a court of general jurisdiction with cognizance over wrongful-death actions that the court's jurisdiction was "appropriate to the occasion," *id.*, at 57. "The existence of the jurisdiction creat[ed] an implication of duty to exercise it," *id.*, at 58, which could not be overcome by disagreement with the policy of the federal Act, *id.*, at 57.

In *McKnett*, the state court refused to exercise jurisdiction over a FELA cause of action against a foreign corporation for an injury suffered in another State. We held "[w]hile Congress has not attempted to compel states to provide courts for the enforcement of the Federal Employers' Liability Act, the Federal Constitution prohibits state courts of general jurisdiction from refusing to do so solely because the suit is brought under a federal law." 292 U. S., at 233–234 (citation omitted). Because the state court had "general jurisdiction of the class of actions to which that here brought belongs, in cases between litigants situated like those in the case at bar," *id.*, at 232, the refusal to hear the FELA action constituted discrimination against rights arising under federal laws, *id.*, at 234, in violation of the Supremacy Clause.

We unanimously reaffirmed these principles in *Testa* v. *Katt*. We held that the Rhode Island courts could not decline jurisdiction over treble damages claims under the fed-

eral Emergency Price Control Act when their jurisdiction was otherwise "adequate and appropriate under established local law." 330 U. S., at 394. The Rhode Island court had distinguished our decisions in *McKnett* and *Mondou* on the grounds that the federal Act was a "penal statute," which would not have been enforceable under the Full Faith and Credit Clause if passed by another State. We rejected that argument. We observed that the Rhode Island court enforced the "same type of claim" arising under state law and claims for double damages under federal law. 330 U. S., at 394. We therefore concluded that the court had "jurisdiction adequate and appropriate under established local law to adjudicate this action." *Ibid.*[18] The court could not decline to exercise this jurisdiction to enforce federal law by labeling it "penal." The policy of the federal Act was to be considered "the prevailing policy in every state" which the state court could not refuse to enforce "'because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers.'" *Id.*, at 393 (quoting *Minneapolis & St. Louis R. Co.* v. *Bombolis*, 241 U. S., at 222).

On only three occasions have we found a valid excuse for a state court's refusal to entertain a federal cause of action. Each of them involved a neutral rule of judicial administration. In *Douglas* v. *New York, N. H. & H. R. Co.*, 279 U. S. 377 (1929), the state statute permitted discretionary dismissal of both federal and state claims where neither the plaintiff nor the defendant was a resident of the forum State.[19] In *Herb*, the City Court denied jurisdiction over a

[18] We cited for this proposition the section of the Rhode Island code authorizing the State District Court and Superior Court to entertain actions for fines, penalties, and forfeitures. See 330 U. S., at 394, n. 13 (citing R. I. Gen. Laws, ch. 631, § 4 (1938)).

[19] We wrote: "It may very well be that if the Supreme Court of New York were given no discretion, being otherwise competent, it would be subject to a duty. But there is nothing in the Act of Congress that purports to force a duty upon such Courts as against an otherwise valid excuse. *Sec-*

FELA action on the grounds that the cause of action arose outside its territorial jurisdiction. Although the state court was not free to dismiss the federal claim "because it is a federal one," we found no evidence that the state courts "construed the state jurisdiction and venue laws in a discriminatory fashion." 324 U. S., at 123. Finally, in *Mayfield*, we held that a state court could apply the doctrine of *forum non conveniens* to bar adjudication of a FELA case if the State "enforces its policy impartially so as not to involve a discrimination against Employers' Liability Act suits." 340 U. S., at 4 (citation omitted).

IV

The parties disagree as to the proper characterization of the District Court of Appeal's decision. Petitioner argues that the court adopted a substantive rule of decision that state agencies are not subject to liability under § 1983. Respondents, stressing the court's language that it had not "opened its own courts for federal actions against the state," 537 So. 2d, at 708, argue that the case simply involves the court's refusal to take cognizance of § 1983 actions against state defendants. We conclude that whether the question is framed in pre-emption terms, as petitioner would have it, or in the obligation to assume jurisdiction over a "federal" cause of action, as respondents would have it, the Florida court's refusal to entertain one discrete category of § 1983 claims, when the court entertains similar state-law actions against state defendants, violates the Supremacy Clause.

If the District Court of Appeal meant to hold that governmental entities subject to § 1983 liability enjoy an immunity over and above those already provided in § 1983, that holding directly violates federal law. The elements of, and the defenses to, a federal cause of action are defined by federal law. See, *e. g.*, *Monessen Southwestern R. Co.* v. *Morgan*, 486

ond Employers' Liability Cases, 223 U. S. 1, 56, 57." 279 U. S., at 387–388.

U. S. 330, 335 (1988); *Chesapeake & Ohio R. Co.* v. *Kuhn*, 284 U. S. 44, 46–47 (1931). A State may not, by statute or common law, create a cause of action under § 1983 against an entity whom Congress has not subjected to liability. *Moor* v. *County of Alameda*, 411 U. S. 693, 698–710 (1973). Since this Court has construed the word "person" in § 1983 to exclude States, neither a federal court nor a state court may entertain a § 1983 action against such a defendant. Conversely, since the Court has held that municipal corporations and similar governmental entities are "persons," see *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 663 (1978); cf. *Will*, 491 U. S., at 69, n. 9; *Mt. Healthy City Bd. of Education* v. *Doyle*, 429 U. S. 274, 280–281 (1977), a state court entertaining a § 1983 action must adhere to that interpretation. "Municipal defenses—including an assertion of sovereign immunity—to a federal right of action are, of course, controlled by federal law." *Owen* v. *City of Independence*, 445 U. S., at 647, n. 30. "By including municipalities within the class of 'persons' subject to liability for violations of the Federal Constitution and laws, Congress—the supreme sovereign on matters of federal law—abolished whatever vestige of the State's sovereign immunity the municipality possessed." *Id.*, at 647–648 (footnote omitted).

In *Martinez* v. *California*, 444 U. S. 277 (1980), we unanimously concluded that a California statute that purported to immunize public entities and public employees from any liability for parole release decisions was pre-empted by § 1983 "even though the federal cause of action [was] being asserted in the state courts." *Id.*, at 284. We explained:

> "'Conduct by persons acting under color of state law which is wrongful under 42 U. S. C. § 1983 or § 1985(3) cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper con-

> struction may be enforced. See *McLaughlin* v. *Tilendis*, 398 F. 2d 287, 290 (7th Cir. 1968). The immunity claim raises a question of federal law.' *Hampton* v. *Chicago*, 484 F. 2d 602, 607 (CA7 1973), cert. denied, 415 U. S. 917." *Id.*, at 284, n. 8.

In *Felder* v. *Casey*, we followed *Martinez* and held that a Wisconsin notice-of-claim statute that effectively shortened the statute of limitations and imposed an exhaustion requirement on claims against public agencies and employees was pre-empted insofar as it was applied to § 1983 actions. After observing that the lower federal courts, with one exception, had determined that notice-of-claim statutes were inapplicable to § 1983 actions brought in federal courts, we stated that such a consensus also demonstrated that "enforcement of the notice-of-claim statute in § 1983 actions brought in state court . . . interfer[ed] with and frustrat[ed] the substantive right Congress created." 487 U. S., at 151. We concluded: "The decision to subject state subdivisions to liability for violations of federal rights . . . was a choice that Congress, not the Wisconsin Legislature, made, and it is a decision that the State has no authority to override." *Id.*, at 143.

While the Florida Supreme Court's actual decision in *Hill* is consistent with the foregoing reasoning, the Court of Appeal's extension of *Hill* to persons subject by § 1983 to liability is flatly inconsistent with that reasoning and the holdings in both *Martinez* and *Felder*. Federal law makes governmental defendants that are not arms of the State, such as municipalities, liable for their constitutional violations. See *St. Louis* v. *Praprotnik*, 485 U. S. 112, 121–122 (1988); *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978). Florida law, as interpreted by the District Court of Appeal, would make all such defendants absolutely immune from liability under the federal statute. To the extent that the Florida law of sovereign immunity reflects a substantive disagreement with the extent to which governmental entities should be held liable for their constitutional

violations, that disagreement cannot override the dictates of federal law. "Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action." *Wilson* v. *Garcia*, 471 U. S. 261, 269 (1985).

If, on the other hand, the District Court of Appeal meant that § 1983 claims are excluded from the category of tort claims that the Circuit Court could hear against a school board, its holding was no less violative of federal law. Cf. *Atlantic Coast Line R. Co.* v. *Burnette*, 239 U. S. 199, 201 (1915). This case does not present the questions whether Congress can require the States to create a forum with the capacity to enforce federal statutory rights or to authorize service of process on parties who would not otherwise be subject to the court's jurisdiction.[20] The State of Florida has constituted the Circuit Court for Pinellas County as a court of general jurisdiction.[21] It exercises jurisdiction over tort claims by private citizens against state entities (including school boards), of the size and type of petitioner's claim here, and it can enter judgment against them. That court also exercises jurisdiction over § 1983 actions against individual officers[22] and is fully competent to provide the remedies the fed-

[20] Virtually every State has expressly or by implication opened its courts to § 1983 actions, and there are no state court systems that refuse to hear § 1983 cases. See S. Steinglass, Section 1983 Litigation in State Courts 1–3, and App. E (1989) (listing cases). We have no occasion to address in this case the contentions of respondents' *amici*, see Brief for National Association of Counties et al. as *Amici Curiae* 16–25; Brief for Washington Legal Foundation et al. as *Amici Curiae* 9–15, that the States need not establish courts competent to entertain § 1983 claims. See *Maine* v. *Thiboutot*, 448 U. S. 1, 3, n. 1 (1980); *Martinez* v. *California*, 444 U. S. 277, 283, n. 7 (1980).

[21] See Fla. Stat. § 26.012(2)(a) (1989).

[22] See, *e. g.*, *Lloyd* v. *Ellis*, 520 So. 2d 59, 60 (App. 1st Dist. 1988); *Skoblow* v. *Ameri-Manage, Inc.*, 483 So. 2d 809, 812 (App. 3d Dist. 1986), aff'd on other grounds, *Spooner* v. *Department of Corrections*, 514 So. 2d 1077 (1987); *Chapman* v. *State Dept. of Health and Rehabilitative Servs.*,

eral statute requires. Cf. *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229, 238 (1969). Petitioner has complied with all the state-law procedures for invoking the jurisdiction of that court.

The mere facts, as argued by respondents' *amici*, that state common law and statutory law do not make unlawful the precise conduct that § 1983 addresses and that § 1983 actions "are more likely to be frivolous than are other suits," Brief for Washington Legal Foundation et al. as *Amici Curiae* 17, clearly cannot provide sufficient justification for the State's refusal to entertain such actions. These reasons have never been asserted by the State and are not asserted by the school board. More importantly, they are not the kind of neutral policy that could be a "valid excuse" for the state court's refusal to entertain federal actions. To the extent that the Florida rule is based upon the judgment that parties who are otherwise subject to the jurisdiction of the court should not be held liable for activity that would not subject them to liability under state law, we understand that to be only another way of saying that the court disagrees with the content of federal law. Sovereign immunity in Florida turns on the nature of the claim—whether the duty allegedly breached is discretionary—not on the subject matter of the dispute. There is no question that the Circuit Court, which entertains state common-law and statutory claims against state entities in a variety of their capacities, ranging from law enforcement to schooling to the protection of individuals using parking lots,[23] has jurisdiction over the subject of this suit. That court cannot reject petitioner's § 1983 claim

517 So. 2d 104, 105–106 (App. 3d Dist. 1987); *Arney* v. *Department of Natural Resources*, 448 So. 2d 1041, 1045 (App. 1st Dist. 1983); *Penthouse, Inc.* v. *Saba*, 399 So. 2d 456, 458–459 (App. 2d Dist. 1981). The Florida courts have also considered on the merits applications for attorney's fees under 42 U. S. C. § 1988, even against county school boards. See, *e. g.*, *Hoffmeister* v. *Coler*, 544 So. 2d 1067 (App. 4th Dist. 1989); *Franklin County School Board* v. *Page*, 540 So. 2d 891 (App. 1st Dist. 1989).

[23] See nn. 7–11, *supra*.

because it has chosen, for substantive policy reasons, not to adjudicate other claims which might also render the school board liable. The federal law is law in the State as much as laws passed by the state legislature. A "state court cannot 'refuse to enforce the right arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers.'" *Testa*, 330 U. S., at 393 (quoting *Minneapolis & St. Louis R. Co.* v. *Bombolis*, 241 U. S., at 222).

The argument by *amici* that suits predicated on federal law are more likely to be frivolous and have less of an entitlement to the State's limited judicial resources warrants little response. A State may adopt neutral procedural rules to discourage frivolous litigation of all kinds, as long as those rules are not pre-empted by a valid federal law. A State may not, however, relieve congestion in its courts by declaring a whole category of federal claims to be frivolous. Until it has been proved that the claim has no merit, that judgment is not up to the States to make.

Respondents have offered no neutral or valid excuse for the Circuit Court's refusal to hear § 1983 actions against state entities. The Circuit Court would have had jurisdiction if the defendant were an individual officer and the action were based on § 1983. It would also have had jurisdiction over the defendant school board if the action were based on established state common law or statutory law. A state policy that permits actions against state agencies for the failure of their officials to adequately police a parking lot and for the negligence of such officers in arresting a person on a roadside, but yet declines jurisdiction over federal actions for constitutional violations by the same persons can be based only on the rationale that such persons should not be held liable for § 1983 violations in the courts of the State. That reason, whether presented in terms of direct disagreement with substantive federal law or simple refusal to take cognizance of

the federal cause of action, flatly violates the Supremacy Clause.

V

Respondents offer two final arguments in support of the judgment of the District Court of Appeal.[24] First, at oral argument—but not in their brief—they argued that a federal court has no power to compel a state court to entertain a claim over which the state court has no jurisdiction as a matter of state law. Second, respondents argue that sovereign immunity is not a creature of state law, but of long-established legal principles which have not been set aside by § 1983. We find no merit in these contentions.

The fact that a rule is denominated jurisdictional does not provide a court an excuse to avoid the obligation to enforce federal law if the rule does not reflect the concerns of power over the person and competence over the subject matter that jurisdictional rules are designed to protect. It is settled that a court of otherwise competent jurisdiction may not avoid its parallel obligation under the Full Faith and Credit Clause to entertain another State's cause of action by invocation of the term "jurisdiction." See *First Nat. Bank of Chicago* v. *United Air Lines, Inc.*, 342 U. S. 396 (1952); *Hughes* v. *Fetter*, 341 U. S. 609, 611 (1951); *Broderick* v. *Rosner*, 294 U. S. 629, 642–643 (1935); *Kenney* v. *Supreme Lodge, Loyal Order of Moose*, 252 U. S. 411 (1920). A State cannot "escape this constitutional obligation to enforce the rights and duties validly created under the laws of other states by the simple device of removing jurisdiction from courts otherwise compe-

[24] Respondents also argue in their brief on the merits that a Florida school board is an arm of the State and thus is not a person under § 1983. This contention was not presented in respondents' brief in opposition to the petition for certiorari, and we decline to reach it here. See *California Board of Equalization* v. *Sierra Summit, Inc.*, 490 U. S. 844, 846, n. 3 (1989); *Canton* v. *Harris*, 489 U. S. 378, 384–385 (1989); *Oklahoma City* v. *Tuttle*, 471 U. S. 808, 815–816 (1985).

tent." *Hughes*, 341 U. S., at 611.[25] Similarly, a State may not evade the strictures of the Privileges and Immunities Clause by denying jurisdiction to a court otherwise competent. See *Angel* v. *Bullington*, 330 U. S. 183, 188–189 (1947); *Douglas* v. *New York, N. H. & H. R. Co.*, 279 U. S. 377 (1929); cf. *White* v. *Hart*, 13 Wall. 646, 653–654 (1872) (Contract Clause). As our discussion of *Testa*, *McKnett*, and *Mondou* establishes, the same is true with respect to a state court's obligations under the Supremacy Clause.[26] The force

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[25] See Currie, The Constitution and the "Transitory" Cause of Action, 73 Harv. L. Rev. 268, 302 (1959) ("The supremacy clause . . . forecloses state social and economic policies just as the full faith and credit clause forecloses them when the subject is solely within the control of a sister state"); Hill, Substance and Procedure in State FELA Actions—The Converse of the Erie Problem?, 17 Ohio St. L. J. 384, 410–411, n. 159 (1956) ("Just as the states are obliged to give effect to legal rights created by other states, so they are obliged, even without a Congressional directive, to give effect to legal rights created by federal law" (citations omitted)); Brilmayer & Underhill, Congressional Obligation to Provide a Forum for Constitutional Claims: Discriminatory Jurisdictional Rules and the Conflict of Laws, 69 Va. L. Rev. 819, 819–829 (1983).

[26] As Justice Brandeis stated in *McKnett* v. *St. Louis & San Francisco R. Co.*, 292 U. S. 230 (1934):

"The power of a State to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them is, of course, subject to the restrictions imposed by the Federal Constitution. The privileges and immunities clause requires a state to accord to citizens of other states substantially the same right of access to its courts as it accords to its own citizens. *Corfield* v. *Coryell*, 4 Wash. C. C. 371, 381. Compare *Canadian Northern Ry. Co.* v. *Eggen*, 252 U. S. 553. The full faith and credit clause requires a state court to take jurisdiction of an action to enforce a judgment recovered in another state, although it might have refused to entertain a suit on the original cause of action as obnoxious to its public policy. *Fauntleroy* v. *Lum*, 210 U. S. 230; *Kenney* v. *Supreme Lodge*, 252 U. S. 411, 415; *Loughran* v. *Loughran*, decided this day, *ante*, p. 216. By *Mondou* v. *New York, N. H. & H. R. Co.*, 223 U. S. 1, an action in a Connecticut court against a domestic corporation, it was settled that a state court whose ordinary jurisdiction as prescribed by local laws is appropriate for the occasion, may not refuse to entertain suits under the Federal Employers' Liability Act." *Id.*, at 233.

of the Supremacy Clause is not so weak that it can be evaded by mere mention of the word "jurisdiction." Indeed, if this argument had merit, the State of Wisconsin could overrule our decision in *Felder* v. *Casey*, 487 U. S. 131 (1988), by simply amending its notice-of-claim statute to provide that no state court would have jurisdiction of an action in which the plaintiff failed to give the required notice. The Supremacy Clause requires more than that.

Respondents' argument that Congress did not intend to abrogate an immunity with an ancient common-law heritage is the same argument, in slightly different dress, as the argument that we have already rejected that the States are free to redefine the federal cause of action. Congress did take common-law principles into account in providing certain forms of absolute and qualified immunity, see *Wood* v. *Strickland*, 420 U. S. 308 (1975); *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974); *Pierson* v. *Ray*, 386 U. S. 547 (1967), and in excluding States and arms of the State from the definition of person, see *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58 (1989); *Ngiraingas* v. *Sanchez*, 495 U. S. 182 (1990); see also *Quern* v. *Jordan*, 440 U. S. 332 (1979). But as to persons that Congress subjected to liability, individual States may not exempt such persons from federal liability by relying on their own common-law heritage. If we were to uphold the immunity claim in this case, every State would have the same opportunity to extend the mantle of sovereign immunity to "persons" who would otherwise be subject to § 1983 liability. States would then be free to nullify for their own people the legislative decisions that Congress has made on behalf of all the People.

The judgment of the Court of Appeal is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

COOTER & GELL *v.* HARTMARX CORP. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-275. Argued February 20, 1990—Decided June 11, 1990

Respondents, the defendants in a District Court suit instituted by petitioner law firm on behalf of a client, filed a motion to dismiss the complaint as having no basis in fact and a motion for sanctions under Federal Rule of Civil Procedure 11 on the ground that the firm had not made sufficient prefiling inquiries to support the complaint's allegations. Rule 11—after specifying, *inter alia*, that an attorney's signature on a pleading constitutes a certificate that he has read it and believes it to be well grounded in fact and legally tenable—provides that, if a pleading is signed in violation of the Rule, the court "shall" impose upon the attorney or his client "an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, . . . including a reasonable attorney's fee." Following petitioner's notice of voluntary dismissal of the complaint under Rule 41(a)(1)(i), the court held that petitioner's prefiling inquiries were grossly inadequate and imposed monetary sanctions upon it and its client. The Court of Appeals affirmed, holding that the voluntary dismissal did not divest the District Court of jurisdiction to rule upon the Rule 11 motion; that that court's determination that petitioner had violated Rule 11 was substantially justified; and that an appellant that successfully defends a Rule 11 award is entitled to recover its reasonable attorney's fees on appeal. The court therefore remanded the case for the District Court to determine the amount of such fees and to enter an appropriate award.

Held:

1. A voluntary Rule 41(a)(1)(i) dismissal does not deprive a district court of jurisdiction over a Rule 11 motion. This view is consistent with Rule 11's purposes of deterring baseless filings and streamlining federal court procedure and is not contradicted by anything in that Rule or Rule 41(a)(1)(i). Pp. 393-398.

(a) Rule 41(a)(1) permits a voluntary dismissal without prejudice only if the plaintiff files a notice of dismissal before the defendant files an answer or summary judgment motion and the plaintiff has never previously dismissed an action "based on or including the same claim." Once the defendant has responded to the complaint, the plaintiff may dismiss only by stipulation or by order "upon such terms and conditions as the

court deems proper." Moreover, a dismissal "operates as an adjudication on the merits" if the plaintiff has previously dismissed the claim. Pp. 393–394.

(b) The district court's jurisdiction, invoked by the filing of the underlying complaint, supports consideration of both the action's merits and the Rule 11 motion arising from that filing. As the Rule 11 violation is complete when the paper is filed, a voluntary dismissal does not expunge the violation. In order to comply with the Rule's requirement that it "shall" impose sanctions, the court must have the authority to consider whether there has been a violation of the signing requirement regardless of the dismissal. Pp. 394–395.

(c) The language of Rules 11 and 41(a)(1) is compatible. Like the imposition of costs, attorney's fees, and contempt sanctions, a Rule 11 sanction is not a judgment on the action's merits, but simply requires the determination of a collateral issue, which may be made after the principal suit's termination. Because such a sanction does not signify a merits determination, its imposition does not deprive the plaintiff of his Rule 41(a) right to dismiss without prejudice. Pp. 395–397.

(d) Because both Rule 41(a)(1) and Rule 11 are aimed at curbing abuses of the judicial system, their policies are completely compatible. Rule 41(a)(1) was designed to limit a plaintiff's ability to dismiss an action in order to curb abuses of pre-existing state and federal procedures allowing dismissals as a matter of right until the entry of the verdict or judgment. It does not codify any policy that the plaintiff's right to one free dismissal also secures the right to file baseless papers. If a litigant could purge his Rule 11 violation merely by taking a dismissal, he would lose all incentive to investigate more carefully before serving and filing papers. Pp. 397–398.

2. A court of appeals should apply an abuse-of-discretion standard in reviewing all aspects of a district court's decision in a Rule 11 proceeding. Petitioner's contention that the Court of Appeals should have applied a three-tiered standard of review—a clearly erroneous standard for findings of historical fact, a *de novo* standard for the determination that counsel violated Rule 11, and an abuse-of-discretion standard for the choice of sanction—is rejected. Pp. 399–405.

(a) Appellate courts must review the selection of a sanction under an abuse-of-discretion standard, since, in directing the district court to impose an "appropriate" sanction, Rule 11 itself indicates that that court is empowered to exercise its discretion. Moreover, in the absence of any language in the Rule to the contrary, courts should adhere to their usual practice of reviewing the district court's findings of fact under a deferential standard. In the present context, the abuse-of-discretion and clearly erroneous standards are indistinguishable: A court of appeals

would be justified in concluding that a district court had abused its discretion in making a factual finding only if the finding were clearly erroneous. Furthermore, the court of appeals must defer to the district court's legal conclusions in Rule 11 proceedings, since those conclusions are rooted in factual determinations rather than purely legal inquiries, and the district court, familiar with the issues and litigants, is better situated to marshal the pertinent facts and apply the necessary fact-dependent legal standard. If the district court based its conclusion on an erroneous view of the law, the appellate court would be justified in concluding that it had abused its discretion. Pp. 400–402.

(b) *Pierce* v. *Underwood*, 487 U. S. 552—which held that a District Court's determination under the Equal Access to Justice Act that "the position of the United States was substantially justified" should be reviewed for an abuse of discretion—strongly supports applying a unitary abuse-of-discretion standard to all aspects of a Rule 11 proceeding. Pp. 403–404.

(c) Adoption of an abuse-of-discretion standard is also supported by Rule 11's policy goals of deterrence and streamlining the judicial process. The district court is best situated to determine whether a sanction is warranted in light of the local bar's litigation practices, and deference to that court's determination will enhance its ability to control litigants, free appellate courts from the duty of reweighing evidence, and discourage litigants from pursuing marginal appeals. Pp. 404–405.

(d) The Court of Appeals' determination that the District Court "applied the correct legal standard and offered substantial justification for its finding of a Rule 11 violation" was consistent with the deferential standard of review adopted here. P. 405.

3. Rule 11 does not authorize a district court to award an attorney's fee incurred on appeal. Pp. 405–409.

(a) Neither the language of the Rule's sanctions provision—when read in light of Rule 1's statement that the Rules only govern district court procedure—nor the Advisory Committee Note suggests that the Rule could require payment for appellate proceedings. Respondents' interpretation that the provision covers any and all expenses incurred "because of the filing" is overbroad. A more sensible reading permits an award only of those expenses directly caused by the filing—logically, those at the trial level—and considers the expenses of defending the award on appeal to arise from the award itself and the taking of the appeal, not from the initial filing of the complaint. Pp. 406–407.

(b) Federal Rule of Appellate Procedure 38—which authorizes courts of appeals to "award just damages and single or double costs to the appellee" upon determining that an appeal is frivolous—places a natural limit on Rule 11's scope. If a Rule 11 appeal is frivolous, as it often

will be given the district court's broad discretion to impose sanctions, Rule 38 gives the appellate court ample authority to award expenses. However, if the appeal is not frivolous, Rule 38 does not require the appellee to pay the appellant's attorney's fees. P. 407.

(c) Limiting Rule 11's scope to trial court expenses accords with the policy of not discouraging meritorious appeals, since many valid challenges might not be filed if unsuccessful appellants were routinely required by the very courts which originally imposed sanctions to shoulder the appellee's fees. Moreover, including such fees in a Rule 11 sanction might have the undesirable effect of encouraging additional satellite litigation, since a losing party subjected to fees on remand might again appeal the award. Even if disallowing a Rule 11 appellate attorney's fees award would discourage litigants from defending the award when appellate expenses were likely to exceed the sanction's amount, the risk of expending the value of one's award while defending it is a natural concomitant of the American Rule, *i. e.*, that the prevailing litigant is ordinarily not entitled to collect an attorney's fee. Pp. 408–409.

277 U. S. App. D. C. 333, 875 F. 2d 890, affirmed in part and reversed in part.

O'CONNOR, J., delivered the opinion for a unanimous Court with respect to Parts I, II, IV, and V, and the opinion of the Court with respect to Part III, in which REHNQUIST, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, SCALIA, and KENNEDY, JJ., joined. STEVENS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 409.

Stephen A. Saltzburg argued the cause for petitioner. With him on the briefs were *Dale A. Cooter* and *Donna S. Mangold*.

Richard J. Favretto argued the cause for respondents. With him on the brief were *Kenneth S. Geller*, *Mark W. Ryan*, *Evan M. Tager*, and *Carey M. Stein*.*

**Alan B. Morrison*, *Paul Alan Levy*, and *David C. Vladeck* filed a brief for Public Citizen as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the Legal Affairs Council by *Wyatt B. Durrette, Jr.*, and *Bradley B. Cavedo;* and for the Washington Legal Foundation by *Daniel J. Popeo*, *Paul D. Kamenar*, and *Richard A. Samp*.

Briefs of *amici curiae* were filed for the Association of Trial Lawyers of America by *Gregory P. Joseph*, *Russ M. Herman*, and *Jeffrey Robert White;* for the Chicago Council of Lawyers by *Thomas R. Meites;* and for the Plaintiff Employment Lawyers Association by *Barry D. Roseman*.

JUSTICE O'CONNOR delivered the opinion of the Court.

This case presents three issues related to the application of Rule 11 of the Federal Rules of Civil Procedure: whether a district court may impose Rule 11 sanctions on a plaintiff who has voluntarily dismissed his complaint pursuant to Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure; what constitutes the appropriate standard of appellate review of a district court's imposition of Rule 11 sanctions; and whether Rule 11 authorizes awards of attorney's fees incurred on appeal of a Rule 11 sanction.*

I

In 1983, Danik, Inc., owned and operated a number of discount men's clothing stores in the Washington, D. C., area. In June 1983, Intercontinental Apparel, a subsidiary of respondent Hartmarx Corp., brought a breach-of-contract action against Danik in the United States District Court for the District of Columbia. Danik, represented by the law firm of Cooter & Gell (petitioner), responded to the suit by filing a counterclaim against Intercontinental, alleging violations of the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. § 13. In March 1984, the District Court granted summary judgment for Intercontinental in its suit against Danik, and, in February 1985, a jury returned a verdict for Intercontinental on Danik's counterclaim. Both judgments were affirmed on appeal. *Danik, Inc.* v. *Intercontinental Apparel, Inc.*, 245 U. S. App. D. C. 233, 759 F. 2d 959 (1985) (judgment order); *Intercontinental Apparel, Inc.* v. *Danik, Inc.*, 251 U. S. App. D. C. 327, 784 F. 2d 1131 (1986) (judgment order).

While this litigation was proceeding, petitioner prepared two additional antitrust complaints against Hartmarx and its

*Because petitioner did not raise the argument that Rule 11 sanctions could only be imposed against the two attorneys who signed the complaint, see *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 493 U. S. 120 (1989), either in the courts below or in its petition for certiorari here, we decline to consider it. See, *e. g.*, *Browning-Ferris Industries* v. *Kelco Disposal, Inc.*, 492 U. S. 257 (1989).

two subsidiaries, respondents Hart, Schaffner & Marx and Hickey-Freeman Co. One of the complaints, the one giving rise to the Rule 11 sanction at issue in this case, alleged a nationwide conspiracy to fix prices and to eliminate competition through an exclusive retail agent policy and uniform pricing scheme, as well as other unfair competition practices such as resale price maintenance and territorial restrictions. App. 3–14.

Petitioner filed the two complaints in November 1983. Respondents moved to dismiss the antitrust complaint at issue, alleging, among other things, that Danik's allegations had no basis in fact. Respondents also moved for sanctions under Rule 11. In opposition to the Rule 11 motion, petitioner filed three affidavits setting forth the prefiling research that supported the allegations in the complaint. *Id.*, at 16–17, 22–23, 24–27. In essence, petitioner's research consisted of telephone calls to salespersons in a number of men's clothing stores in New York City, Philadelphia, Baltimore, and Washington, D. C. Petitioner inferred from this research that only one store in each major metropolitan area nationwide sold Hart, Schaffner & Marx suits.

In April 1984, petitioner filed a notice of voluntary dismissal of the complaint, pursuant to Rule 41(a)(1)(i). The dismissal became effective in July 1984, when the District Court granted petitioner's motion to dispense with notice of dismissal to putative class members. In June 1984, before the dismissal became effective, the District Court heard oral argument on the Rule 11 motion. The District Court took the Rule 11 motion under advisement.

In December 1987, 3½ years after its hearing on the motion and after dismissal of the complaint, the District Court ordered respondents to submit a statement of costs and attorney's fees. Respondents filed a statement requesting $61,917.99 in attorney's fees. Two months later, the District Court granted respondents' motion for Rule 11 sanctions, holding that petitioner's prefiling inquiry was grossly inade-

quate. Specifically, the District Court found that the allegations in the complaint regarding exclusive retail agency arrangements for Hickey-Freeman clothing were completely baseless because petitioner researched only the availability of Hart, Schaffner & Marx menswear. In addition, the District Court found that petitioner's limited survey of only four Eastern cities did not support the allegation that respondents had exclusive retailer agreements in every major city in the United States. Accordingly, the District Court determined that petitioner violated Rule 11 and imposed a sanction of $21,452.52 against petitioner and $10,701.26 against Danik.

The Court of Appeals for the District of Columbia Circuit affirmed the imposition of Rule 11 sanctions. *Danik, Inc.* v. *Hartmarx Corp.*, 277 U. S. App. D. C. 333, 875 F. 2d 890 (1989). Three aspects of its decision are at issue here.

First, the Court of Appeals rejected petitioner's argument that Danik's voluntary dismissal of the antitrust complaint divested the District Court of jurisdiction to rule upon the Rule 11 motion. After reviewing the decisions of other Circuits considering the issue, the Court of Appeals concluded that "the policies behind Rule 11 do not permit a party to escape its sanction by merely dismissing an unfounded case." *Id.*, at 337, 875 F. 2d, at 894. The court reasoned that because Rule 11 sanctions served to punish and deter, they secured the proper functioning of the legal system "independent of the burdened party's interest in recovering its expenses." *Id.*, at 338, 875 F. 2d, at 895. Accordingly, the court held that such sanctions must "be available in appropriate circumstances notwithstanding a private party's effort to cut its losses and run out of court, using Rule 41 as an emergency exit." *Ibid.*

Second, the Court of Appeals affirmed the District Court's determination that petitioner had violated Rule 11. Petitioner's arguments failed to "cal[l] into doubt" the two fatal deficiencies identified by the District Court. Rather, peti-

tioner's "account of [its] efforts d[id] no more than confirm these shortcomings." *Ibid.*

Third, the Court of Appeals considered respondents' claim that petitioner should also pay the expenses respondents incurred in defending its Rule 11 award on appeal. Relying on *Westmoreland* v. *CBS, Inc.*, 248 U. S. App. D. C. 255, 770 F. 2d 1168 (1985), the Court of Appeals held that an appellant that successfully defends a Rule 11 award is entitled to recover its attorney's fees on appeal and remanded the case to the District Court to determine the amount of reasonable attorney's fees and to enter an appropriate award.

II

The Rules Enabling Act, 28 U. S. C. § 2072, authorizes the Court to "prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before Magistrates thereof) and courts of appeals." The Court has no authority to enact rules that "abridge, enlarge or modify any substantive right." *Ibid.* Pursuant to this authority, the Court promulgated the Federal Rules of Civil Procedure to "govern the procedure in the United States district courts in all suits of a civil nature." Fed. Rule Civ. Proc. 1. We therefore interpret Rule 11 according to its plain meaning, see *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 493 U. S. 120, 123 (1989), in light of the scope of the congressional authorization.

Rule 11 provides, in full:

> "Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of

an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee."

An interpretation of the current Rule 11 must be guided, in part, by an understanding of the deficiencies in the original version of Rule 11 that led to its revision. The 1938 version of Rule 11 required an attorney to certify by signing the pleading "that to the best of his knowledge, information, and belief there is good ground to support [the pleading]; and that it is not interposed for delay . . . or is signed with intent to defeat the purpose of this rule." 28 U. S. C., pp. 2616–2617 (1940 ed.). An attorney who willfully violated the rule could be "subjected to appropriate disciplinary action." *Ibid.* Moreover, the pleading could "be stricken as sham and false and the action [could] proceed as though the pleading had not

been served." *Ibid.* In operation, the Rule did not have the deterrent effect expected by its drafters. See Advisory Committee Note on Rule 11, 28 U. S. C. App., pp. 575–576. The Advisory Committee identified two problems with the old Rule. First, the Rule engendered confusion regarding when a pleading should be struck, what standard of conduct would make an attorney liable to sanctions, and what sanctions were available. Second, courts were reluctant to impose disciplinary measures on attorneys, see *ibid.*, and attorneys were slow to invoke the Rule. Vairo, Rule 11: A Critical Analysis, 118 F. R. D. 189, 191 (1988).

To ameliorate these problems, and in response to concerns that abusive litigation practices abounded in the federal courts, the Rule was amended in 1983. See Schwarzer, Sanctions Under the New Federal Rule 11—A Closer Look, 104 F. R. D. 181 (1985). It is now clear that the central purpose of Rule 11 is to deter baseless filings in district court and thus, consistent with the Rules Enabling Act's grant of authority, streamline the administration and procedure of the federal courts. See Advisory Committee Note on Rule 11, 28 U. S. C. App., p. 576. Rule 11 imposes a duty on attorneys to certify that they have conducted a reasonable inquiry and have determined that any papers filed with the court are well grounded in fact, legally tenable, and "not interposed for any improper purpose." An attorney who signs the paper without such a substantiated belief "shall" be penalized by "an appropriate sanction." Such a sanction may, but need not, include payment of the other parties' expenses. See *ibid.* Although the Rule must be read in light of concerns that it will spawn satellite litigation and chill vigorous advocacy, *ibid.*, any interpretation must give effect to the Rule's central goal of deterrence.

III

We first address the question whether petitioner's dismissal of its antitrust complaint pursuant to Rule 41(a)(1)(i)

deprived the District Court of the jurisdiction to award attorney's fees. Rule 41(a)(1) states:

> "(1) *By Plaintiff; by Stipulation.* Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim."

Rule 41(a)(1) permits a plaintiff to dismiss an action without prejudice only when he files a notice of dismissal before the defendant files an answer or motion for summary judgment and only if the plaintiff has never previously dismissed an action "based on or including the same claim." Once the defendant has filed a summary judgment motion or answer, the plaintiff may dismiss the action only by stipulation, Rule 41(a)(1)(ii), or by order of the court, "upon such terms and conditions as the court deems proper," Rule 41(a)(2). If the plaintiff invokes Rule 41(a)(1) a second time for an "action based on or including the same claim," the action must be dismissed with prejudice.

Petitioner contends that filing a notice of voluntary dismissal pursuant to this Rule automatically deprives a court of jurisdiction over the action, rendering the court powerless to impose sanctions thereafter. Of the Courts of Appeals to consider this issue, only the Court of Appeals for the Second Circuit has held that a voluntary dismissal acts as a jurisdictional bar to further Rule 11 proceedings. See *Johnson*

Chemical Co. v. *Home Care Products, Inc.*, 823 F. 2d 28, 31 (1987).

The view more consistent with Rule 11's language and purposes, and the one supported by the weight of Circuit authority, is that district courts may enforce Rule 11 even after the plaintiff has filed a notice of dismissal under Rule 41(a)(1). See *Szabo Food Service, Inc.* v. *Canteen Corp.*, 823 F. 2d 1073, 1076–1079 (CA7 1987), cert. dism'd, 485 U. S. 901 (1988); *Greenberg* v. *Sala*, 822 F. 2d 882, 885 (CA9 1987); *Muthig* v. *Brant Point Nantucket, Inc.*, 838 F. 2d 600, 603–604 (CA1 1988). The district court's jurisdiction, invoked by the filing of the underlying complaint, supports consideration of both the merits of the action and the motion for Rule 11 sanctions arising from that filing. As the "violation of Rule 11 is complete when the paper is filed," *Szabo Food Service, Inc.*, *supra*, at 1077, a voluntary dismissal does not expunge the Rule 11 violation. In order to comply with Rule 11's requirement that a court "shall" impose sanctions "[i]f a pleading, motion, or other paper is signed in violation of this rule," a court must have the authority to consider whether there has been a violation of the signing requirement regardless of the dismissal of the underlying action. In our view, nothing in the language of Rule 41(a)(1)(i), Rule 11, or other statute or Federal Rule terminates a district court's authority to impose sanctions after such a dismissal.

It is well established that a federal court may consider collateral issues after an action is no longer pending. For example, district courts may award costs after an action is dismissed for want of jurisdiction. See 28 U. S. C. § 1919. This Court has indicated that motions for costs or attorney's fees are "independent proceeding[s] supplemental to the original proceeding and not a request for a modification of the original decree." *Sprague* v. *Ticonic National Bank*, 307 U. S. 161, 170 (1939). Thus, even "years after the entry of a judgment on the merits" a federal court could consider an award of counsel fees. *White* v. *New Hampshire Dept. of*

Employment Security, 455 U. S. 445, 451, n. 13 (1982). A criminal contempt charge is likewise "'a separate and independent proceeding at law'" that is not part of the original action. *Bray* v. *United States*, 423 U. S. 73, 75 (1975), quoting *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 445 (1911). A court may make an adjudication of contempt and impose a contempt sanction even after the action in which the contempt arose has been terminated. See *United States* v. *Mine Workers*, 330 U. S. 258, 294 (1947) ("Violations of an order are punishable as criminal contempt even though . . . the basic action has become moot"); *Gompers* v. *Bucks Stove & Range Co.*, *supra*, at 451 (when main case was settled, action became moot, "of course without prejudice to the power and right of the court to punish for contempt by proper proceedings"). Like the imposition of costs, attorney's fees, and contempt sanctions, the imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate. Such a determination may be made after the principal suit has been terminated.

Because a Rule 11 sanction does not signify a district court's assessment of the legal merits of the complaint, the imposition of such a sanction after a voluntary dismissal does not deprive the plaintiff of his right under Rule 41(a)(1) to dismiss an action without prejudice. "[D]ismissal . . . without prejudice" is a dismissal that does not "operat[e] as an adjudication upon the merits," Rule 41(a)(1), and thus does not have a res judicata effect. Even if a district court indicated that a complaint was not legally tenable or factually well founded for Rule 11 purposes, the resulting Rule 11 sanction would nevertheless not preclude the refiling of a complaint. Indeed, even if the Rule 11 sanction imposed by the court were a prohibition against refiling the complaint (assuming that would be an "appropriate sanction" for Rule 11 purposes), the preclusion of refiling would be neither a consequence of the

dismissal (which was without prejudice) nor a "term or condition" placed upon the dismissal (which was unconditional), see Rule 41(a)(2).

The foregoing interpretation is consistent with the policy and purpose of Rule 41(a)(1), which was designed to limit a plaintiff's ability to dismiss an action. Prior to the promulgation of the Federal Rules, liberal state and federal procedural rules often allowed dismissals or nonsuits as a matter of right until the entry of the verdict, see, *e. g.*, N. C. Code § 1–224 (1943), or judgment, see, *e. g.*, La. Code Prac. Ann., Art. 491 (1942). See generally Note, The Right of a Plaintiff to Take a Voluntary Nonsuit or to Dismiss His Action Without Prejudice, 37 Va. L. Rev. 969 (1951). Rule 41(a)(1) was designed to curb abuses of these nonsuit rules. See 2 American Bar Association, Proceedings of the Institute on Federal Rules, Cleveland, Ohio, 350 (1938) (Rule 41(a)(1) was intended to eliminate "the annoying of a defendant by being summoned into court in successive actions and then, if no settlement is arrived at, requiring him to permit the action to be dismissed and another one commenced at leisure") (remarks of Judge George Donworth, member of the Advisory Committee on Rules of Civil Procedure); *id.*, at 309; see also 9 C. Wright & A. Miller, Federal Practice and Procedure § 2363, p. 152 (1971). Where state statutes and common law gave plaintiffs expansive control over their suits Rule 41(a)(1) preserved a narrow slice: It allowed a plaintiff to dismiss an action without the permission of the adverse party or the court only during the brief period before the defendant had made a significant commitment of time and money. Rule 41(a)(1) was not designed to give a plaintiff any benefit other than the right to take one such dismissal without prejudice.

Both Rule 41(a)(1) and Rule 11 are aimed at curbing abuses of the judicial system, and thus their policies, like their language, are completely compatible. Rule 41(a)(1) limits a litigant's power to dismiss actions, but allows one dismissal without prejudice. Rule 41(a)(1) does not codify any policy

that the plaintiff's right to one free dismissal also secures the right to file baseless papers. The filing of complaints, papers, or other motions without taking the necessary care in their preparation is a separate abuse of the judicial system, subject to separate sanction. As noted above, a voluntary dismissal does not eliminate the Rule 11 violation. Baseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay. Even if the careless litigant quickly dismisses the action, the harm triggering Rule 11's concerns has already occurred. Therefore, a litigant who violates Rule 11 merits sanctions even after a dismissal. Moreover, the imposition of such sanctions on abusive litigants is useful to deter such misconduct. If a litigant could purge his violation of Rule 11 merely by taking a dismissal, he would lose all incentive to "stop, think and investigate more carefully before serving and filing papers." Amendments to Federal Rules of Civil Procedure, 97 F. R. D. 165, 192 (1983) (Letter from Judge Walter Mansfield, Chairman, Advisory Committee on Civil Rules) (Mar. 9, 1982).

We conclude that petitioner's voluntary dismissal did not divest the District Court of jurisdiction to consider respondents' Rule 11 motion. Although Rule 11 does not establish a deadline for the imposition of sanctions, the Advisory Committee did not contemplate that there would be a lengthy delay prior to their imposition, such as occurred in this case. Rather, "it is anticipated that in the case of pleadings the sanctions issue under Rule 11 normally will be determined at the end of the litigation, and in the case of motions at the time when the motion is decided or shortly thereafter." Advisory Committee Note on Rule 11, 28 U. S. C. App., p. 576. District courts may, of course, "adopt local rules establishing timeliness standards," *White* v. *New Hampshire Dept. of Employment Security*, 455 U. S., at 454, for filing and deciding Rule 11 motions.

IV

Petitioner further contends that the Court of Appeals did not apply a sufficiently rigorous standard in reviewing the District Court's imposition of Rule 11 sanctions. Determining whether an attorney has violated Rule 11 involves a consideration of three types of issues. The court must consider factual questions regarding the nature of the attorney's prefiling inquiry and the factual basis of the pleading or other paper. Legal issues are raised in considering whether a pleading is "warranted by existing law or a good faith argument" for changing the law and whether the attorney's conduct violated Rule 11. Finally, the district court must exercise its discretion to tailor an "appropriate sanction."

The Court of Appeals in this case did not specify the applicable standard of review. There is, however, precedent in the District of Columbia Circuit for applying an abuse-of-discretion standard to the determination whether a filing had an insufficient factual basis or was interposed for an improper purpose, but reviewing *de novo* the question whether a pleading or motion is legally sufficient. See, *e. g.*, *International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Airline Div.)* v. *Association of Flight Attendants*, 274 U. S. App. D. C. 370, 373, 864 F. 2d 173, 176 (1988); *Westmoreland* v. *CBS, Inc.*, 248 U. S. App. D. C., at 261, 770 F. 2d, at 1174–1175. Petitioner contends that the Court of Appeals for the Ninth Circuit has adopted the appropriate approach. That Circuit reviews findings of historical fact under the clearly erroneous standard, the determination that counsel violated Rule 11 under a *de novo* standard, and the choice of sanction under an abuse-of-discretion standard. See *Zaldivar* v. *Los Angeles*, 780 F. 2d 823, 828 (1986). The majority of Circuits follow neither approach; rather, they apply a deferential standard to all issues raised by a Rule 11 violation. See *Kale* v. *Combined Ins. Co. of America*, 861 F. 2d 746, 757–758 (CA1 1988); *Teamsters Local Union No. 430* v. *Cement Express, Inc.*, 841 F.

2d 66, 68 (CA3), cert. denied, 488 U. S. 848 (1988); *Stevens* v. *Lawyers Mutual Liability Ins. Co. of North Carolina*, 789 F. 2d 1056, 1060 (CA4 1986); *Thomas* v. *Capital Security Services, Inc.*, 836 F. 2d 866, 872 (CA5 1988) (en banc); *Century Products, Inc.* v. *Sutter*, 837 F. 2d 247, 250 (CA6 1988); *Mars Steel Corp.* v. *Continental Bank N. A.*, 880 F. 2d 928, 933 (CA7 1989); *Adamson* v. *Bowen*, 855 F. 2d 668, 673 (CA10 1988).

Although the Courts of Appeals use different verbal formulas to characterize their standards of review, the scope of actual disagreement is narrow. No dispute exists that the appellate courts should review the district court's selection of a sanction under a deferential standard. In directing the district court to impose an "appropriate" sanction, Rule 11 itself indicates that the district court is empowered to exercise its discretion. See also Advisory Committee Note on Rule 11, 28 U. S. C. App., p. 576 (suggesting that a district court "has discretion to tailor sanctions to the particular facts of the case, with which it should be well acquainted").

The Circuits also agree that, in the absence of any language to the contrary in Rule 11, courts should adhere to their usual practice of reviewing the district court's findings of fact under a deferential standard. See Fed. Rule Civ. Proc. 52(a) ("Findings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses"). In practice, the "clearly erroneous" standard requires the appellate court to uphold any district court determination that falls within a broad range of permissible conclusions. See, *e. g.*, *Anderson* v. *Bessemer City*, 470 U. S. 564, 573–574 (1985) ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice

between them cannot be clearly erroneous"); *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U. S. 844, 857–858 (1982). When an appellate court reviews a district court's factual findings, the abuse-of-discretion and clearly erroneous standards are indistinguishable: A court of appeals would be justified in concluding that a district court had abused its discretion in making a factual finding only if the finding were clearly erroneous.

The scope of disagreement over the appropriate standard of review can thus be confined to a narrow issue: whether the court of appeals must defer to the district court's legal conclusions in Rule 11 proceedings. A number of factors have led the majority of Circuits, see *supra*, at 399–400, as well as a number of commentators, see, *e. g.*, C. Shaffer & P. Sandler, Sanctions: Rule 11 and Other Powers 14–15 (2d ed. 1988) (hereinafter Shaffer & Sandler); American Judicature Society, Rule 11 in Transition, The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11, pp. 45–49 (Burbank, reporter 1989), to conclude that appellate courts should review all aspects of a district court's imposition of Rule 11 sanctions under a deferential standard.

The Court has long noted the difficulty of distinguishing between legal and factual issues. See *Pullman-Standard* v. *Swint*, 456 U. S. 273, 288 (1982) ("Rule 52(a) does not furnish particular guidance with respect to distinguishing law from fact. Nor do we yet know of any other rule or principle that will unerringly distinguish a factual finding from a legal conclusion"). Making such distinctions is particularly difficult in the Rule 11 context. Rather than mandating an inquiry into purely legal questions, such as whether the attorney's legal argument was correct, the Rule requires a court to consider issues rooted in factual determinations. For example, to determine whether an attorney's prefiling inquiry was reasonable, a court must consider all the circumstances of a case. An inquiry that is unreasonable when an attorney has months to prepare a complaint may be reasonable when he has only a

few days before the statute of limitations runs. In considering whether a complaint was supported by fact and law "to the best of the signer's knowledge, information, and belief," a court must make some assessment of the signer's credibility. Issues involving credibility are normally considered factual matters. See Fed. Rule Civ. Proc. 52; see also *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 332 (1952). The considerations involved in the Rule 11 context are similar to those involved in determining negligence, which is generally reviewed deferentially. See *Mars Steel Corp.* v. *Continental Bank N. A.*, *supra*, at 932; see also 9 C. Wright & A. Miller, Federal Practice and Procedure § 2590 (1971); *McAllister* v. *United States*, 348 U. S. 19, 20–22 (1954) (holding that the District Court's findings of negligence were not clearly erroneous). Familiar with the issues and litigants, the district court is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard mandated by Rule 11. Of course, this standard would not preclude the appellate court's correction of a district court's legal errors, *e. g.*, determining that Rule 11 sanctions could be imposed upon the signing attorney's law firm, see *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 493 U. S. 120 (1989), or relying on a materially incorrect view of the relevant law in determining that a pleading was not "warranted by existing law or a good faith argument" for changing the law. An appellate court would be justified in concluding that, in making such errors, the district court abused its discretion. "[I]f a district court's findings rest on an erroneous view of the law, they may be set aside on that basis." *Pullman-Standard* v. *Swint*, *supra*, at 287. See also *Icicle Seafoods, Inc.* v. *Worthington*, 475 U. S. 709, 714 (1986) ("If [the Court of Appeals] believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the District Court's judgment").

Pierce v. *Underwood*, 487 U. S. 552 (1988), strongly supports applying a unitary abuse-of-discretion standard to all aspects of a Rule 11 proceeding. In *Pierce*, the Court held a District Court's determination under the Equal Access to Justice Act (EAJA), 28 U. S. C. §2412(d) (1982 ed.), that "the position of the United States was substantially justified" should be reviewed for an abuse of discretion. As a position is "substantially justified" if it "has a reasonable basis in law and fact," 487 U. S., at 566, n. 2, the EAJA requires an inquiry similar to the Rule 11 inquiry whether a pleading is "well grounded in fact" and legally tenable. Although the EAJA and Rule 11 are not completely analogous, the reasoning in *Pierce* is relevant for determining the Rule 11 standard of review.

Two factors the Court found significant in *Pierce* are equally pertinent here. First, the Court indicated that "'as a matter of the sound administration of justice,'" deference was owed to the "'judicial actor . . . better positioned than another to decide the issue in question.'" 487 U. S., at 559–560, quoting *Miller* v. *Fenton*, 474 U. S. 104, 114 (1985). Because a determination whether a legal position is "substantially justified" depends greatly on factual determinations, the Court reasoned that the district court was "better positioned" to make such factual determinations. See 487 U. S., at 560. A district court's ruling that a litigant's position is factually well grounded and legally tenable for Rule 11 purposes is similarly fact specific. *Pierce* also concluded that the district court's rulings on legal issues should be reviewed deferentially. See *id.*, at 560–561. According to the Court, review of legal issues under a *de novo* standard would require the courts of appeals to invest time and energy in the unproductive task of determining "not what the law now is, but what the Government was substantially justified in believing it to have been." *Ibid.* Likewise, an appellate court reviewing legal issues in the Rule 11 context would be required to determine whether, at the time the attorney filed the

pleading or other paper, his legal argument would have appeared plausible. Such determinations "will either fail to produce the normal law-clarifying benefits that come from an appellate decision on a question of law, or else will strangely distort the appellate process" by establishing circuit law in "a most peculiar, secondhanded fashion." *Id.*, at 561.

Second, *Pierce* noted that only deferential review gave the district court the necessary flexibility to resolve questions involving "'multifarious, fleeting, special, narrow facts that utterly resist generalization.'" *Id.*, at 561–562. The question whether the Government has taken a "substantially justified" position under all the circumstances involves the consideration of unique factors that are "little susceptible . . . of useful generalization." *Ibid.* The issues involved in determining whether an attorney has violated Rule 11 likewise involve "fact-intensive, close calls." Shaffer & Sandler 15. Contrary to petitioner's contentions, *Pierce* v. *Underwood* is not distinguishable on the ground that sanctions under Rule 11 are mandatory: That sanctions "shall" be imposed when a violation is found does not have any bearing on how to review the question whether the attorney's conduct violated Rule 11.

Rule 11's policy goals also support adopting an abuse-of-discretion standard. The district court is best acquainted with the local bar's litigation practices and thus best situated to determine when a sanction is warranted to serve Rule 11's goal of specific and general deterrence. Deference to the determination of courts on the front lines of litigation will enhance these courts' ability to control the litigants before them. Such deference will streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court; it will also discourage litigants from pursuing marginal appeals, thus reducing the amount of satellite litigation.

Although district courts' identification of what conduct violates Rule 11 may vary, see Schwarzer, Rule 11 Revisited,

101 Harv. L. Rev. 1013, 1015–1017 (1988); Note, A Uniform Approach to Rule 11 Sanctions, 97 Yale L. J. 901 (1988), some variation in the application of a standard based on reasonableness is inevitable. "Fact-bound resolutions cannot be made uniform through appellate review, de novo or otherwise." *Mars Steel Corp.* v. *Continental Bank N. A.*, 880 F. 2d, at 936; see also Shaffer & Sandler 14–15. An appellate court's review of whether a legal position was reasonable or plausible enough under the circumstances is unlikely to establish clear guidelines for lower courts; nor will it clarify the underlying principles of law. See *Pierce*, *supra*, at 560–561.

In light of our consideration of the purposes and policies of Rule 11 and in accordance with our analysis of analogous EAJA provisions, we reject petitioner's contention that the Court of Appeals should have applied a three-tiered standard of review. Rather, an appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination. A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. Here, the Court of Appeals determined that the District Court "applied the correct legal standard and offered substantial justification for its finding of a Rule 11 violation." 277 U. S. App. D. C., at 339, 875 F. 2d, at 896. Its affirmance of the District Court's liability determination is consistent with the deferential standard we adopt today.

V

Finally, the Court of Appeals held that respondents were entitled to be reimbursed for attorney's fees they had incurred in defending their award on appeal. Accordingly, it remanded to the District Court "to determine such expenses and, ultimately, to enter an appropriate award." *Id.*, at 341, 875 F. 2d, at 898. This ruling accorded with the decisions of the Courts of Appeals for the First and Seventh Circuits, see

Muthig v. *Brant Point Nantucket, Inc.*, 838 F. 2d, at 607, and *Hays* v. *Sony Corp. of America*, 847 F. 2d 412, 419–420 (CA7 1988), and conflicted with the decisions of the Fourth and Ninth Circuits, see *Basch* v. *Westinghouse Electric Corp.*, 777 F. 2d 165, 175 (CA4 1985), cert. denied, 476 U. S. 1108 (1986), and *Orange Production Credit Assn.* v. *Frontline Ventures Ltd.*, 801 F. 2d 1581, 1582–1583 (CA9 1986).

On its face, Rule 11 does not apply to appellate proceedings. Its provision allowing the court to include "an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee" must be interpreted in light of Federal Rule of Civil Procedure 1, which indicates that the Rules only "govern the procedure in the United States district courts." Neither the language of Rule 11 nor the Advisory Committee Note suggests that the Rule could require payment for any activities outside the context of district court proceedings.

Respondents interpret the last sentence of Rule 11 as extending the scope of the sanction to cover any expenses, including fees on appeal, incurred "because of the filing." In this case, respondents argue, they would have incurred none of their appellate expenses had petitioner's lawsuit not been filed. This line of reasoning would lead to the conclusion that expenses incurred "because of" a baseless filing extend indefinitely. Cf. W. Keeton, D. Dobbs, R. Keeton, & D. Owens, Prosser and Keeton on Law of Torts § 41, p. 264 (5th ed. 1984) ("In a philosophical sense, the consequences of an act go forward to eternity. . . . As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability" (footnote omitted)). Such an interpretation of the Rule is overbroad. We believe Rule 11 is more sensibly understood as permitting an award only of those expenses directly caused by the filing, logically, those at the trial level. A plaintiff's filing requires the de-

fendant to take the necessary steps to defend against the suit in district court; if the filing was baseless, attorneys' fees incurred in that defense were triggered by the Rule 11 violation. If the district court imposes Rule 11 sanctions on the plaintiff, and the plaintiff appeals, the expenses incurred in defending the award on appeal are directly caused by the district court's sanction and the appeal of that sanction, not by the plaintiff's initial filing in district court.

The Federal Rules of Appellate Procedure place a natural limit on Rule 11's scope. On appeal, the litigants' conduct is governed by Federal Rule of Appellate Procedure 38, which provides: "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." If the appeal of a Rule 11 sanction is itself frivolous, Rule 38 gives appellate courts ample authority to award expenses. Indeed, because the district court has broad discretion to impose Rule 11 sanctions, appeals of such sanctions may frequently be frivolous. See 9 J. Moore, B. Ward, & J. Lucas, Moore's Federal Practice ¶238.03[2], pp. 38–13, 38–14 (2d ed. 1989) ("[W]here an appeal challenges actions or findings of the district court to which an appellate court gives deference by judging under an abuse of discretion or clearly erroneous standard, the court is more likely to find that the appellant's arguments are frivolous"). If the appeal is not frivolous under this standard, Rule 38 does not require the appellee to pay the appellant's attorney's fees. Respondents' interpretation of Rule 11 would give a district court the authority to award attorney's fees to the appellee even when the appeal would not be sanctioned under the appellate rules. To avoid this somewhat anomalous result, Rules 11 and 38 are better read together as allowing expenses incurred on appeal to be shifted onto appellants only when those expenses are caused by a frivolous appeal, and not merely because a Rule 11 sanction upheld on appeal can ultimately be traced to a baseless filing in district court.

Limiting Rule 11's scope in this manner accords with the policy of not discouraging meritorious appeals. If appellants were routinely compelled to shoulder the appellees' attorney's fees, valid challenges to district court decisions would be discouraged. The knowledge that, after an unsuccessful appeal of a Rule 11 sanction, the district court that originally imposed the sanction would also decide whether the appellant should pay his opponent's attorney's fee would be likely to chill all but the bravest litigants from taking an appeal. See *Webster* v. *Sowders*, 846 F. 2d 1032, 1040 (CA6 1988) ("Appeals of district court orders should not be deterred by threats [of Rule 11 sanctions] from district judges"). Moreover, including appellate attorney's fees in a Rule 11 sanction might have the undesirable effect of encouraging additional satellite litigation. For example, if a district court included appellate attorney's fees in the Rule 11 sanction on remand, the losing party might again appeal the amount of the award.

It is possible that disallowing an award of appellate attorney's fees under Rule 11 would discourage litigants from defending the award on appeal when appellate expenses are likely to exceed the amount of the sanction. There is some doubt whether this proposition is empirically correct. See American Judicature Society, Rule 11 in Transition, The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11, p. 51 (Burbank, reporter 1989). The courts of appeals have ample authority to protect the beneficiaries of Rule 11 sanctions by awarding damages and single or double costs under Rule 38—which they may do, as we have noted, when the appellant had no reasonable prospect of meeting the difficult standard of abuse of discretion. Beyond that protection, however, the risk of expending the value of one's award in the course of defending it is a natural concomitant of the American Rule, *i. e.*, that "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240, 247 (1975). Whenever

damages awards at the trial level are small, a successful plaintiff will have less incentive to defend the award on appeal. As Rule 11 is not a fee-shifting statute, the policies for allowing district courts to require the losing party to pay appellate, as well as district court attorney's fees, are not applicable. "A movant under Rule 11 has no entitlement to fees or any other sanction, and the contrary view can only breed appellate litigation." American Judicature Society, *supra*, at 49.

We affirm the Court of Appeals' conclusion that a voluntary dismissal does not deprive a district court of jurisdiction over a Rule 11 motion and hold that an appellate court should review the district court's decision in a Rule 11 proceeding for an abuse of discretion. As Rule 11 does not authorize a district court to award attorney's fees incurred on appeal, we reverse that portion of the Court of Appeals' judgment remanding the case to the district court for a determination of reasonable appellate expenses. For the foregoing reasons, the judgment of the court below is affirmed in part and reversed in part.

It is so ordered.

JUSTICE STEVENS, concurring in part and dissenting in part.

Rule 11 and Rule 41(a)(1) are both designed to facilitate the just, speedy, and inexpensive determination of cases in federal court. Properly understood, the two Rules should work in conjunction to prevent the prosecution of needless or baseless lawsuits. Rule 11 requires the court to impose an "appropriate sanction" on a litigant who wastes judicial resources by filing a pleading that is not well grounded in fact and warranted by existing law or a good-faith argument for its extension, modification, or reversal. Rule 41(a)(1) permits a plaintiff who decides not to continue a lawsuit to withdraw his complaint before an answer or motion for summary judgment has been filed and avoid further proceedings on the basis of that complaint. The Court today, however, refuses

to read the two Rules together in light of their limited, but valuable, purposes. By focusing on the filing of baseless complaints, without any attention to whether those complaints will result in the waste of judicial resources, the Court vastly expands the contours of Rule 11, eviscerates Rule 41(a)(1), and creates a federal common law of malicious prosecution inconsistent with the limited mandate of the Rules Enabling Act.

Prior to the adoption of Rule 41(a)(1), a plaintiff in federal court could dismiss an action at law up until the entry of the verdict or judgment. Under that practice, an unscrupulous plaintiff could harass a defendant by filing repetitive baseless lawsuits as long as each was dismissed prior to an adverse ruling on the merits. The Rule is designed to further the just decision of cases in two significant ways. First, by providing that a second voluntary dismissal is an adjudication on the merits, and that the first such dismissal is without prejudice only if the dismissal precedes the filing of an answer or a motion for summary judgment, Rule 41(a)(1) satisfies the interest in preventing the abusive filing of repetitious, frivolous lawsuits. Second, and of equal importance, by giving the plaintiff the absolute, unqualified right to dismiss his complaint without permission of the court or notice to his adversary, the framers of Rule 41(a)(1) intended to preserve the right of the plaintiff to reconsider his decision to file suit "during the brief period before the defendant had made a significant commitment of time and money." *Ante*, at 397. The Rule permits a plaintiff to file a complaint to preserve his rights under a statute of limitations and then reconsider that decision prior to the joinder of issue and the commencement of litigation.

In theory, Rule 11 and Rule 41(a)(1) should work in tandem. When a complaint is withdrawn under Rule 41(a)(1), the merits of that complaint are not an appropriate area of further inquiry for the federal court. The predicate for the imposition of sanctions, the complaint, has been eliminated

under the express authorization of the Federal Rules before the court has been required to take any action on it, and the consideration of a Rule 11 motion on a dismissed complaint would necessarily result in an increase in the judicial workload. When a plaintiff persists in the prosecution of a meritless complaint, however, or the defendant joins issue by filing an answer or motion for summary judgment, Rule 11 has a proper role to play. The prosecution of baseless lawsuits and the filing of frivolous papers are matters of legitimate concern to the federal courts and are abuses that Rule 11 was designed to deter.

The Court holds, however, that a voluntary dismissal does not eliminate the predicate for a Rule 11 violation because a frivolous complaint that is withdrawn burdens "courts and individuals alike with needless expense and delay." *Ante*, at 398. That assumption is manifestly incorrect with respect to courts. The filing of a frivolous complaint which is voluntarily withdrawn imposes a burden on the court only if the notation of an additional civil proceeding on the court's docket sheet can be said to constitute a burden. By definition, a voluntary dismissal under Rule 41(a)(1) means that the court has not had to consider the factual allegations of the complaint or ruled on a motion to dismiss its legal claims.

The Court's observation that individuals are burdened, even if correct, is irrelevant. Rule 11 is designed to deter parties from abusing judicial resources, not from filing complaints. Whatever additional costs in reputation or legal expenses the defendant might incur, on top of those that are the product of being in a dispute,[1] are likely to be either minimal or noncompensable.[2] More fundamentally, the fact that the

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[1] It is telling that the primary injury that the respondents point to is the injury to their reputation caused by the public attention that lawsuit attracted. Brief for Respondents 19.

[2] In those rare cases in which the defendant properly incurs great costs in preparing a motion to dismiss a frivolous complaint, he can lock in the right to file a Rule 11 motion by answering the complaint and making his

filing of a complaint imposes costs on a defendant should be of no concern to the rulemakers if the complaint does not impose any costs on the judiciary: the Rules Enabling Act does not give us authority to create a generalized federal common law of malicious prosecution divorced from concerns with the efficient and just processing of cases in federal court. The only result of the Court's interpretation will be to increase the frequency of Rule 11 motions and decrease that of voluntary dismissals.

I agree that dismissal of an action pursuant to Rule 41(a)(1) does not deprive the district court of jurisdiction to resolve collateral issues.[3] A court thus may impose sanctions for contempt on a party who has voluntarily dismissed his complaint or impose sanctions under 28 U. S. C. § 1927 against lawyers who have multiplied court proceedings vexatiously. A court may also impose sanctions under Rule 11 for a complaint that is not withdrawn before a responsive pleading is filed or for other pleadings that are not well grounded and find no warrant in the law or arguments for the law's extension, modification or reversal. If a plaintiff files a false or frivolous affidavit in response to a motion to dismiss for lack of jurisdiction, I have no doubt that he can be sanctioned for that filing. In those cases, the action of the party constitutes an abuse of judicial resources. But when a plaintiff has voluntarily dismissed a complaint pursuant to Rule 41(a)(1), a collateral proceeding to examine whether the complaint is well grounded will stretch out the matter long beyond the time in which either the plaintiff or the defendant would otherwise want to litigate the merits of the claim. An interpretation that can only have the unfortunate consequences of encouraging the filing of sanction motions and discouraging voluntary dismissals cannot be a sensible interpretation of Rules that are designed "to secure the just, speedy, and in-

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motion to dismiss in the form of a Rule 12(c) motion for judgment on the pleadings.

[3] I also join Parts I, II, IV, and V of the Court's opinion.

expensive determination of every action." Fed. Rule Civ. Proc. 1.

Despite the changes that have taken place at the bar since I left the active practice 20 years ago, I still believe that most lawyers are wise enough to know that their most precious asset is their professional reputation. Filing unmeritorious pleadings inevitably tarnishes that asset. Those who do not understand this simple truth can be dealt with in appropriate disciplinary proceedings, state-law actions for malicious prosecution or abuse of process, or, in extreme cases, contempt proceedings. It is an unnecessary waste of judicial resources and an unwarranted perversion of the Federal Rules to hold such lawyers liable for Rule 11 sanctions in actions in federal court.

OFFICE OF PERSONNEL MANAGEMENT *v.* RICHMOND

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 88–1943. Argued February 21, 1990—Decided June 11, 1990

Not wishing to exceed a statutory limit on earnings that would disqualify him from continuing to receive a disability annuity based on his years of civilian service with the Navy, respondent Richmond sought advice from Navy employee relations personnel and received erroneous oral and written information. When Richmond's reliance on the information caused him to earn more than permitted by the relevant statute, petitioner, the Office of Personnel Management (OPM), denied him six months of benefits. The Merit Systems Protection Board denied his petition for review, rejecting his contention that the erroneous advice given him should estop OPM and bar its finding him ineligible for benefits under the statute. The Court of Appeals reversed, ruling that the misinformation estopped the Government, and that the estoppel required payment of benefits despite the statutory provision to the contrary.

Held: Payments of money from the Federal Treasury are limited to those authorized by statute, and erroneous advice given by a Government employee to a benefits claimant cannot estop the Government from denying benefits not otherwise permitted by law. Pp. 419–434.

(a) Although dicta in some recent cases—*e. g.*, *Montana* v. *Kennedy*, 366 U. S. 308, 314–315; *INS* v. *Hibi*, 414 U. S. 5, 8 *(per curiam)*—have suggested, contrary to the Court's long-recognized rule, that there might be situations in which employee misconduct could give rise to estoppel against the Government, the Court has reversed, often summarily, every lower court finding of estoppel it has reviewed. The Court need not, however, address the Government's suggestion that, in order to avoid confusion in this area, the Court should adopt a flat rule that estoppel will never lie against the Government. A narrower ground of decision controls the type of suit presented in this case. Pp. 419–424.

(b) A claim for payment of money from the Public Treasury contrary to a statutory appropriation is prohibited by the Appropriations Clause of the Constitution, Art. I, § 9, cl. 7, which provides in effect that such money may be paid out only as authorized by a statute. Thus, judicial use of the equitable doctrine of estoppel cannot grant respondent a

money remedy that Congress has not authorized. Recognition of equitable estoppel could render the Appropriations Clause a nullity if agents of the Executive were able, by their unauthorized oral or written statements to citizens, to obligate the Treasury contrary to the wishes of Congress. Where Congress wishes to recognize claims for estoppel, it knows how to do so, as it has done by statute in the past. Pp. 424–429.

(c) This decision is supported by the Court's estoppel precedents, which have never upheld an estoppel claim against the Government for the payment of money; by provisions of the Federal Tort Claims Act (FTCA) which authorize private suits against the Government based on its agents' torts, but exclude misrepresentation claims similar to Richmond's; and by Congress' historical and continuing practice of reserving to itself the power to address hardship claims arising from misinformation or erroneous advice given by Government officials. Although Congress has made a general appropriation of funds to pay judgments against the Government under the FTCA and other statutory authorizations for suits against the Government, none of those provisions encompass, or authorize payment for, Richmond's claim. A rule of estoppel would invite endless litigation over both real and imagined claims of misinformation, imposing an unpredictable and substantial drain on the public fisc, and might prompt the Government, in order to limit liability, to cut back and impose strict controls on the free and valuable information it now provides to the public. Pp. 429–434.

862 F. 2d 294, reversed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, O'CONNOR, and SCALIA, JJ., joined. WHITE, J., filed a concurring opinion, in which BLACKMUN, J., joined, *post*, p. 434. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 435. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 437.

Solicitor General Starr argued the cause for petitioner. With him on the briefs were *Assistant Attorney General Gerson*, *Deputy Solicitor General Shapiro*, *William Kanter*, and *Richard Olderman*.

Gill Deford argued the cause for respondent. With him on the brief were *Peter Komlos-Hrobsky* and *Neal S. Dudovitz*.

JUSTICE KENNEDY delivered the opinion of the Court.

This case presents the question whether erroneous oral and written advice given by a Government employee to a

benefits claimant may give rise to estoppel against the Government and so entitle the claimant to a monetary payment not otherwise permitted by law. We hold that payments of money from the Federal Treasury are limited to those authorized by statute, and we reverse the contrary holding of the Court of Appeals.

I

Not wishing to exceed a statutory limit on earnings that would disqualify him from a disability annuity, respondent Charles Richmond sought advice from a federal employee and received erroneous information. As a result he earned more than permitted by the eligibility requirements of the relevant statute and lost six months of benefits. Respondent now claims that the erroneous and unauthorized advice should give rise to equitable estoppel against the Government, and that we should order payment of the benefits contrary to the statutory terms. Even on the assumption that much equity subsists in respondent's claim, we cannot agree with him or the Court of Appeals that we have authority to order the payment he seeks.

Respondent was a welder at the Navy Public Works Center in San Diego, California. He left this position in 1981 after petitioner, the Office of Personnel Management (OPM), approved his application for a disability retirement. OPM determined that respondent's impaired eyesight prevented him from performing his job and made him eligible for a disability annuity under 5 U. S. C. § 8337(a). Section 8337(a) provides this benefit for disabled federal employees who have completed five years of service. The statute directs, however, that the entitlement to disability payments will end if the retired employee is "restored to an earning capacity fairly comparable to the current rate of pay of the position occupied at the time of retirement." § 8337(d).

The statutory rules for restoration of earning capacity are central to this case. Prior to 1982, an individual was deemed

restored to earning capacity, and so rendered ineligible for a disability annuity, if

> "in *each of 2 succeeding calendar years* the income of the annuitant from wages or self-employment . . . equals at least 80 percent of the current rate of pay of the position occupied immediately before retirement." 5 U. S. C. § 8337(d) (1976 ed.) (emphasis added).

The provision was amended in 1982 by the Omnibus Budget Reconciliation Act, Pub. L. 97–253, 96 Stat. 792, to change the measuring period for restoration of earning capacity from two years to one:

> "Earning capacity is deemed restored if *in any calendar year* the income of the annuitant from wages or self-employment or both equals at least 80 percent of the current rate of pay of the position occupied immediately before retirement." 5 U. S. C. § 8337(d) (emphasis added).

After taking disability retirement for his vision impairment, respondent undertook part-time employment as a schoolbus driver. From 1982 to 1985, respondent earned an average of $12,494 in this job, leaving him under the 80% limit for entitlement to continued annuity payments. In 1986, however, he had an opportunity to earn extra money by working overtime. Respondent asked an employee relations specialist at the Navy Public Works Center's Civilian Personnel Department for information about how much he could earn without exceeding the 80% eligibility limit. Relying upon the terms of the repealed pre-1982 statute, under which respondent could retain the annuity unless his income exceeded the 80% limit in *two* consecutive years, the specialist gave respondent incorrect advice. The specialist also gave respondent a copy of Attachment 4 to Federal Personnel Manual Letter 831–64, published by OPM, which also stated the former 2-year eligibility rule. The OPM form was correct when written in 1981; but when given to respondent, the

form was out of date and therefore inaccurate. Respondent returned to the Navy in January 1987 and again was advised in error that eligibility would be determined under the old 2-year rule.

After receiving the erroneous information, respondent concluded that he could take on the extra work as a schoolbus driver in 1986 while still receiving full disability benefits for impaired vision so long as he kept his income for the previous and following years below the statutory level. He earned $19,936 during 1986, exceeding the statutory eligibility limit. OPM discontinued respondent's disability annuity on June 30, 1987. The annuity was restored on January 1, 1988, since respondent did not earn more than allowed by the statute in 1987. Respondent thus lost his disability payments for a 6-month period, for a total amount of $3,993.

Respondent appealed the denial of benefits to the Merit Systems Protection Board (MSPB). He argued that the erroneous advice given him by the Navy personnel should estop OPM and bar its finding him ineligible for benefits under the statute. The MSPB rejected this argument, noting that the officials who misinformed respondent were from the Navy, not OPM. The MSPB observed that, "[h]ad [respondent] directed his request for information to the OPM, presumably, he would have learned of the change in the law." The MSPB held that "OPM cannot be estopped from enforcing a statutorily imposed requirement for retirement eligibility." App. to Pet. for Cert. 22a. The MSPB denied respondent's petition for review, and respondent appealed to the Court of Appeals for the Federal Circuit.

A divided panel of the Court of Appeals reversed, accepting respondent's contention that the misinformation from Navy personnel estopped the Government, and that the estoppel required payment of disability benefits despite the statutory provision to the contrary. The Court of Appeals acknowledged the longstanding rule that "ordinarily the government may not be estopped because of erroneous or unau-

thorized statements of government employees when the asserted estoppel would nullify a requirement prescribed by Congress." 862 F. 2d 294, 296 (1988). Nonetheless, the Court of Appeals focused on this Court's statement in an earlier case that "we are hesitant . . . to say that there are *no cases*" where the Government might be estopped. *Heckler* v. *Community Health Services of Crawford County, Inc.*, 467 U. S. 51, 60 (1984). The Court of Appeals then discussed other Court of Appeals and District Court opinions that had applied estoppel against the Government.

The Court of Appeals majority decided that "[b]ased on the Supreme Court's acknowledgment that the estoppel against the government is not foreclosed and based on court of appeals rulings applying estoppel against the government, our view is that estoppel is properly applied against the government in the present case." 862 F. 2d, at 299. The Court reasoned that the provision of the out-of-date OPM form was "affirmative misconduct" that should estop the Government from denying respondent benefits in accordance with the statute. The facts of this case, it held, are "sufficiently unusual and extreme that no concern is warranted about exposing the public treasury to estoppel in broad or numerous categories of cases." *Id.*, at 301. Judge Mayer dissented, stating that the majority opinion made "a chasm out of the crack the Supreme Court left open in *Community Health Services*," and that the award of benefits to respondent "contravenes the express mandate of Congress in 5 U. S. C. § 8337(d) . . . and Supreme Court precedent." *Id.*, at 301, 303.

We granted certiorari, 493 U. S. 806 (1989).

II

From our earliest cases, we have recognized that equitable estoppel will not lie against the Government as it lies against private litigants. In *Lee* v. *Munroe & Thornton*, 7 Cranch 366 (1813), we held that the Government could not be bound

by the mistaken representations of an agent unless it were clear that the representations were within the scope of the agent's authority. In *The Floyd Acceptances*, 7 Wall. 666 (1869), we held that the Government could not be compelled to honor bills of exchange issued by the Secretary of War where there was no statutory authority for the issuance of the bills. In *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 408–409 (1917), we dismissed the argument that unauthorized representations by agents of the Government estopped the United States to prevent erection of power houses and transmission lines across a public forest in violation of a statute: "Of this it is enough to say that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit."

The principles of these and many other cases were reiterated in *Federal Crop Ins. Corporation* v. *Merrill*, 332 U. S. 380 (1947), the leading case in our modern line of estoppel decisions. In *Merrill*, a farmer applied for insurance under the Federal Crop Insurance Act to cover his wheat farming operations. An agent of the Federal Crop Insurance Corporation advised the farmer that his entire crop qualified for insurance, and the farmer obtained insurance through the Corporation. After the crop was lost, it was discovered that the agent's advice had been in error, and that part of the farmer's crop was reseeded wheat, not eligible for federal insurance under the applicable regulation. While we recognized the serious hardship caused by the agent's misinformation, we nonetheless rejected the argument that his representations estopped the Government to deny insurance benefits. We recognized that "not even the temptations of a hard case" will provide a basis for ordering recovery contrary to the terms of the regulation, for to do so would disregard "the duty of all courts to observe the conditions defined by Congress for charging the public treasury." *Id.*, at 385–386.

Despite the clarity of these earlier decisions, dicta in our more recent cases have suggested the possibility that there might be some situation in which estoppel against the Government could be appropriate. The genesis of this idea appears to be an observation found at the end of our opinion in *Montana* v. *Kennedy*, 366 U. S. 308 (1961). In that case, petitioner brought a declaratory judgment action seeking to establish his American citizenship. After discussing petitioner's two statutory claims at length, we rejected the final argument that a consular official's erroneous advice to petitioner's mother that she could not return to the United States while pregnant prevented petitioner from having been born in the United States and thus deprived him of United States citizenship. Our discussion was limited to the observation that in light of the fact that no legal obstacle prevented petitioner's mother from returning to the United States,

> "what may have been only the consular official's well-meant advice—'I am sorry, Mrs., you cannot [return to the United States] in that condition'—falls far short of misconduct such as might prevent the United States from relying on petitioner's foreign birth. In this situation, we need not stop to inquire whether, as some lower courts have held, there may be circumstances in which the United States is estopped to deny citizenship because of the conduct of its officials." *Id.*, at 314–315.

The proposition about which we did not "stop to inquire" in *Kennedy* has since taken on something of a life of its own. Our own opinions have continued to mention the possibility, in the course of rejecting estoppel arguments, that some type of "affirmative misconduct" might give rise to estoppel against the Government. See *INS* v. *Hibi*, 414 U. S. 5, 8 (1973) *(per curiam)* ("While the issue of whether 'affirmative misconduct' on the part of the Government might estop it from denying citizenship was left open in *Montana* v. *Kennedy*, 366 U. S. 308, 314, 315 (1961), no conduct of the sort

there adverted to was involved here"); *Schweiker* v. *Hansen*, 450 U. S. 785, 788 (1981) *(per curiam)* (denying an estoppel claim for Social Security benefits on the authority of *Merrill*, *supra*, but observing that the Court "has never decided what type of conduct by a Government employee will estop the Government from insisting upon compliance with valid regulations governing the distribution of welfare benefits"); *INS* v. *Miranda*, 459 U. S. 14, 19 (1982) *(per curiam)* ("This case does not require us to reach the question we reserved in *Hibi*, whether affirmative misconduct in a particular case would estop the Government from enforcing the immigration laws"); *Heckler* v. *Community Health Services*, 467 U. S., at 60 ("We have left the issue open in the past, and do so again today").

The language in our decisions has spawned numerous claims for equitable estoppel in the lower courts. As JUSTICE MARSHALL stated in dissent in *Hansen*, *supra*, "[t]he question of when the Government may be equitably estopped has divided the distinguished panel of the Court of Appeals in this case, has received inconsistent treatment from other Courts of Appeals, and has been the subject of considerable ferment." 450 U. S., at 791 (citing cases). Since that observation was made, federal courts have continued to accept estoppel claims under a variety of rationales and analyses. In sum, Courts of Appeals have taken our statements as an invitation to search for an appropriate case in which to apply estoppel against the Government, yet we have reversed every finding of estoppel that we have reviewed. Indeed, no less than three of our most recent decisions in this area have been summary reversals of decisions upholding estoppel claims. See *Hibi*, *supra*; *Hansen*, *supra*; *Miranda*, *supra*. Summary reversals of courts of appeals are unusual under any circumstances. The extraordinary number of such dispositions in this single area of the law provides a good indication that our approach to these cases has provided inadequate

guidance for the federal courts and served only to invite and prolong needless litigation.

The Solicitor General proposes to remedy the present confusion in this area of the law with a sweeping rule. As it has in the past, the Government asks us to adopt "a flat rule that estoppel may not in any circumstances run against the Government." *Community Health Services*, *supra*, at 60. The Government bases its broad rule first upon the doctrine of sovereign immunity. Noting that the "'United States, as sovereign, is immune from suit save as it consents to be sued,'" *United States* v. *Mitchell*, 445 U. S. 535, 538 (1980), petitioner asserts that the courts are without jurisdiction to entertain a suit to compel the Government to act contrary to a statute, no matter what the context or circumstances. See Brief for Petitioner 12–13. Petitioner advances as a second basis for this rule the doctrine of separation of powers. Petitioner contends that to recognize estoppel based on the misrepresentations of Executive Branch officials would give those misrepresentations the force of law, and thereby invade the legislative province reserved to Congress. This rationale, too, supports the petitioner's contention that estoppel may never justify an order requiring executive action contrary to a relevant statute, no matter what statute or what facts are involved.

We have recognized before that the "arguments the Government advances for the rule are substantial." *Community Health Services*, *supra*, at 60. And we agree that this case should be decided under a clearer form of analysis than "we will know an estoppel when we see one." *Hansen*, *supra*, at 792 (MARSHALL, J., dissenting). But it remains true that we need not embrace a rule that no estoppel will lie against the Government in any case in order to decide this case. We leave for another day whether an estoppel claim could ever succeed against the Government. A narrower ground of decision is sufficient to address the type of suit presented here,

a claim for payment of money from the Public Treasury contrary to a statutory appropriation.

III

The Appropriations Clause of the Constitution, Art. I, § 9, cl. 7, provides that: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." For the particular type of claim at issue here, a claim for money from the Federal Treasury, the Clause provides an explicit rule of decision. Money may be paid out only through an appropriation made by law; in other words, the payment of money from the Treasury must be authorized by a statute. All parties here agree that the award respondent seeks would be in direct contravention of the federal statute upon which his ultimate claim to the funds must rest, 5 U. S. C. § 8337. The point is made clearer when the appropriation supporting the benefits sought by respondent is examined. In the same subchapter of the United States Code as the eligibility requirements, Congress established the Civil Service Retirement and Disability Fund. § 8348(a)(1)(A). That section states in pertinent part: "The Fund . . . is appropriated for the payment of . . . benefits *as provided by* this subchapter . . . ." (Emphasis added.) The benefits respondent claims were not "provided by" the relevant provision of the subchapter; rather, they were specifically denied. It follows that Congress has appropriated no money for the payment of the benefits respondent seeks, and the Constitution prohibits that any money "be drawn from the Treasury" to pay them.

Our cases underscore the straightforward and explicit command of the Appropriations Clause. "It means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, 321 (1937) (citing *Reeside* v. *Walker*, 11 How. 272, 291 (1851)). In *Reeside*, *supra*, we addressed a claim brought by the holder of a judgment of indebtedness against the United States that the Secretary of

the Treasury of the United States should be ordered to enter the claim upon the books of the Treasury so that the debt might be paid. In rejecting petitioner's claim for relief, we stated as an alternative ground for decision that if

> "the petition in this case was allowed so far as to order the verdict against the United States to be entered on the books of the Treasury Department, the plaintiff would be as far from having a claim on the Secretary or Treasurer to pay it as now. The difficulty in the way is the want of any appropriation by Congress to pay this claim. It is a well-known constitutional provision, that no money can be taken or drawn from the Treasury except under an appropriation by Congress. See Constitution, art. 1, § 9 (1 Stat. at Large, 15).
>
> "However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned. Any other course would give to the fiscal officers a most dangerous discretion." *Id.*, at 291.

The command of the Clause is not limited to the relief available in a judicial proceeding seeking payment of public funds. Any exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury. We have held, for example, that while the President's pardon power may remove all disabilities from one convicted of treason, that power does not extend to an order to repay from the Treasury the proceeds derived from the sale of the convict's forfeited property:

> "So, also, if the proceeds have been paid into the treasury, the right to them has so far become vested in the United States that they can only be secured to the former owner of the property through an act of Congress. Moneys once in the treasury can only be withdrawn by an appropriation by law. However large, therefore,

> may be the power of pardon possessed by the President, and however extended may be its application, there is this limit to it, as there is to all his powers,—it cannot touch moneys in the treasury of the United States, except expressly authorized by act of Congress." *Knote* v. *United States*, 95 U. S. 149, 154 (1877).

Just as the pardon power cannot override the command of the Appropriations Clause, so too judicial use of the equitable doctrine of estoppel cannot grant respondent a money remedy that Congress has not authorized. See *INS* v. *Pangilinan*, 486 U. S. 875, 883 (1988) ("'Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law'").

We have not had occasion in past cases presenting claims of estoppel against the Government to discuss the Appropriations Clause, for reasons that are apparent. Given the strict rule against estoppel applied as early as 1813 in *Lee* v. *Munroe & Thornton*, 7 Cranch 366, claims of estoppel could be dismissed on that ground without more. In our cases following *Montana* v. *Kennedy*, 366 U. S. 308 (1961), reserving the possibility that estoppel might lie on some facts, we have held only that the particular facts presented were insufficient. As discussed *supra*, at 423–424, we decline today to accept the Solicitor General's argument for an across-the-board no-estoppel rule. But this makes it all the more important to state the law and to settle the matter of estoppel as a basis for money claims against the Government.

Our decision is consistent with both the holdings and the rationale expressed in our estoppel precedents. Even our recent cases evince a most strict approach to estoppel claims involving public funds. See *Community Health Services*, 467 U. S., at 63 ("Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law"). The course of our jurisprudence shows why: Opinions have differed on whether this Court has ever accepted an estoppel claim in other contexts, see *id.*,

at 60 (suggesting that *United States* v. *Pennsylvania Industrial Chemical Corp.*, 411 U. S. 655 (1973) *(PICCO)*, was decided on estoppel grounds); 467 U. S., at 68 (opinion of REHNQUIST, J.) (*PICCO* not an estoppel case), but not a single case has upheld an estoppel claim against the Government for the payment of money. And our cases denying estoppel are animated by the same concerns that prompted the Framers to include the Appropriations Clause in the Constitution. As Justice Story described the Clause:

> "The object is apparent upon the slightest examination. It is to secure regularity, punctuality, and fidelity, in the disbursements of the public money. As all the taxes raised from the people, as well as revenues arising from other sources, are to be applied to the discharge of the expenses, and debts, and other engagements of the government, it is highly proper, that congress should possess the power to decide how and when any money should be applied for these purposes. If it were otherwise, the executive would possess an unbounded power over the public purse of the nation; and might apply all its moneyed resources at his pleasure. The power to control and direct the appropriations, constitutes a most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public peculation. . . ." 2 Commentaries on the Constitution of the United States § 1348 (3d ed. 1858).

The obvious practical consideration cited by Justice Story for adherence to the requirement of the Clause is the necessity, existing now as much as at the time the Constitution was ratified, of preventing fraud and corruption. We have long ago accepted this ground as a reason that claims for estoppel cannot be entertained where public money is at stake, refusing to "introduce a rule against an abuse, of which, by improper collusions, it would be very difficult for the public to protect itself." *Lee*, *supra*, at 370. But the Clause has a more fundamental and comprehensive purpose, of direct rele-

vance to the case before us. It is to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants.

Extended to its logical conclusion, operation of estoppel against the Government in the context of payment of money from the Treasury could in fact render the Appropriations Clause a nullity. If agents of the Executive were able, by their unauthorized oral or written statements to citizens, to obligate the Treasury for the payment of funds, the control over public funds that the Clause reposes in Congress in effect could be transferred to the Executive. If, for example, the President or Executive Branch officials were displeased with a new restriction on benefits imposed by Congress to ease burdens on the fisc (such as the restriction imposed by the statutory change in this case) and sought to evade them, agency officials could advise citizens that the restrictions were inapplicable. Estoppel would give this advice the practical force of law, in violation of the Constitution.

It may be argued that a rule against estoppel could have the opposite result, that the Executive might frustrate congressional intent to appropriate benefits by instructing its agents to give claimants erroneous advice that would deprive them of the benefits. But Congress may always exercise its power to expand recoveries for those who rely on mistaken advice should it choose to do so. In numerous other contexts where Congress has been concerned at the possibility of significant detrimental reliance on the erroneous advice of Government agents, it has provided appropriate legislative relief. See, *e. g.*, Federal Election Campaign Act of 1971, 2 U. S. C. §§ 437f and 438(e); Federal Trade Commission Act, 15 U. S. C. § 57b–4; Securities Act of 1933, 15 U. S. C. § 77s(a); Truth in Lending Act, 15 U. S. C. § 1640(f); Portal-to-Portal Act of 1947, 29 U. S. C. § 259; Employee Retirement Income Security Act of 1974, 29 U. S. C. § 1028; Tech-

nical and Miscellaneous Revenue Act of 1988, Pub. L. 100–647, § 8018, 102 Stat. 3794.

One example is of particular relevance. In *Schweiker* v. *Hansen*, 450 U. S. 785 (1981), we rejected an estoppel claim made by a Social Security claimant who failed to file a timely written application for benefits as required by the relevant statute. Congress then addressed such situations in the Budget Reconciliation Act of 1989 by providing that for claims to old age, survivors, and disability insurance, and for supplemental security income:

> "In any case in which it is determined to the satisfaction of the Secretary that an individual failed as of any date to apply for monthly insurance benefits under this title by reason of misinformation provided to such individual by any officer or employee of the Social Security Administration relating to such individual's eligibility for benefits under this title, such individual shall be deemed to have applied for such benefits on the later of [the date on which the misinformation was given or the date upon which the applicant became eligible for benefits apart from the application requirement]." Pub. L. 101–239, § 10302, 103 Stat. 2481.

The equities are the same whether executive officials' erroneous advice has the effect of frustrating congressional intent to withhold funds or to pay them. In the absence of estoppel for money claims, Congress has ready means to see that payments are made to those who rely on erroneous Government advice. Judicial adoption of estoppel based on agency misinformation would, on the other hand, vest authority in these agents that Congress would be powerless to constrain.

The provisions of the Federal Tort Claims Act (FTCA), 28 U. S. C. §§ 1346(b), 2671 *et seq.*, also provide a strong indication of Congress' general approach to claims based on governmental misconduct, and suggest that it has considered and rejected the possibility of an additional exercise of its appropriation power to fund claims similar to those advanced here.

The FTCA provides authorization in certain circumstances for suits by citizens against the Federal Government for torts committed by Government agents. Yet the FTCA by its terms excludes both negligent and intentional misrepresentation claims from its coverage. See § 2680(h). The claim brought by respondent is in practical effect one for misrepresentation, despite the application of the "estoppel" label. We would be most hesitant to create a judicial doctrine of estoppel that would nullify a congressional decision against authorization of the same class of claims.

Indeed, it would be most anomalous for a judicial order to require a Government official, such as the officers of OPM, to make an extrastatutory payment of federal funds. It is a federal crime, punishable by fine and imprisonment, for any Government officer or employee to knowingly spend money in excess of that appropriated by Congress. See 31 U. S. C. §§ 1341, 1350. If an executive officer on his own initiative had decided that, in fairness, respondent should receive benefits despite the statutory bar, the official would risk prosecution. That respondent now seeks a court order to effect the same result serves to highlight the weakness and novelty of his claim.

The whole history and practice with respect to claims against the United States reveals the impossibility of an estoppel claim for money in violation of a statute. Congress' early practice was to adjudicate each individual money claim against the United States, on the ground that the Appropriations Clause forbade even a delegation of individual adjudicatory functions where payment of funds from the Treasury was involved. See W. Cowen, P. Nichols, & M. Bennett, The United States Court of Claims, A History, 216 Ct. Cl. 1, 5 (1978). As the business of the Federal Legislature has grown, Congress has placed the individual adjudication of claims based on the Constitution, statutes, or contracts, or on specific authorizations of suit against the Government, with the Judiciary. See, *e. g.*, the Tucker Act, 28 U. S. C.

§§ 1346, 1491. But Congress has always reserved to itself the power to address claims of the very type presented by respondent, those founded not on any statutory authority, but upon the claim that "the equities and circumstances of a case create a moral obligation on the part of the Government to extend relief to an individual." Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, Supplemental Rules of Procedure for Private Claims Bills, 101st Cong., 1st Sess., 2 (Comm. Print 1989).

In so-called "congressional reference" cases, Congress refers proposed private bills to the United States Claims Court for an initial determination of the merits of the claim, but retains final authority over the ultimate appropriation. See 28 U. S. C. §§ 1492, 2509(c). Congress continues to employ private legislation to provide remedies in individual cases of hardship. See, *e. g.*, Priv. L. 99–3, 100 Stat. 4314, and 131 Cong. Rec. 9675 (1985) (waiving statutory deadline under 5 U. S. C. § 8337(d) where petitioner failed to make timely application due to misinformation of Government personnel officer); Priv. L. 100–37, 102 Stat. 4860, and H. R. Rep. No. 291, 100th Cong., 1st Sess. (1987) (awarding funds lost by servicemen who joined wrong retirement plan in reliance on erroneous advice). Where sympathetic facts arise, cf. *post*, at 435–436 (STEVENS, J., concurring in judgment), these examples show the means by which those facts can be addressed. In short, respondent asks us to create by judicial innovation an authority over funds that is assigned by the Constitution to Congress alone, and that Congress has not seen fit to delegate.

Congress has, of course, made a general appropriation of funds to pay judgments against the United States rendered under its various authorizations for suits against the Government, such as the Tucker Act and the FTCA. See 31 U. S. C. § 1304. But respondent's claim for relief does not arise under any of these provisions. Rather, he sought and ob-

tained an order of enrollment in the disability annuity plan, 5 U. S. C. § 8337, in direct violation of that plan's requirements. See 862 F. 2d, at 301 (remanding respondent's case to the MSPB "with instructions to direct the agency to issue the withheld disability benefits to Mr. Richmond").

The general appropriation for payment of judgments, in any event, does not create an all-purpose fund for judicial disbursement. A law that identifies the source of funds is not to be confused with the conditions prescribed for their payment. Rather, funds may be paid out only on the basis of a judgment based on a substantive right to compensation based on the express terms of a specific statute. This principle is set forth in our leading case on jurisdiction over claims against the Government, *United States* v. *Testan*, 424 U. S. 392 (1976). As stated in JUSTICE BLACKMUN's opinion for the Court:

> "Where the United States is the defendant and the plaintiff is not suing for money improperly exacted or retained, the basis of the federal claim—whether it be the Constitution, a statute, or a regulation—does not create a cause of action for money damages unless . . . that basis 'in itself . . . can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" *Id.*, at 401–402.

Given this rule, as well as our many precedents establishing that authorizations for suits against the Government must be strictly construed in its favor, see, *e. g.*, *Library of Congress* v. *Shaw*, 478 U. S. 310, 318 (1986); *McMahon* v. *United States*, 342 U. S. 25, 27 (1951), we cannot accept the suggestion, *post*, at 438–440 (MARSHALL, J., dissenting), that the terms of a statute should be ignored based on the facts of individual cases. Here the relevant statute by its terms excludes respondent's claim, and his remedy must lie with Congress.

Respondent would have us ignore these obstacles on the ground that estoppel against the Government would have beneficial effects. But we are unwilling to "tamper with

these established principles because it might be thought that they should be responsive to a particular conception of enlightened governmental policy." *Testan, supra*, at 400. And respondent's attempts to justify estoppel on grounds of public policy are suspect on their own terms. Even short of collusion by individual officers or improper executive attempts to frustrate legislative policy, acceptance of estoppel claims for Government funds could have pernicious effects. It ignores reality to expect that the Government will be able to "secure perfect performance from its hundreds of thousands of employees scattered throughout the continent." *Hansen* v. *Harris*, 619 F. 2d 942, 954 (CA2 1980) (Friendly, J., dissenting), rev'd *sub nom. Schweiker* v. *Hansen*, 450 U. S. 785 (1981). To open the door to estoppel claims would only invite endless litigation over both real and imagined claims of misinformation by disgruntled citizens, imposing an unpredictable drain on the public fisc. Even if most claims were rejected in the end, the burden of defending such estoppel claims would itself be substantial.

Also questionable is the suggestion that if the Government is not bound by its agents' statements, then citizens will not trust them and will instead seek private advice from lawyers, accountants, and others, creating wasteful expenses. Although mistakes occur, we may assume with confidence that Government agents attempt conscientious performance of their duties and in most cases provide free and valuable information to those who seek advice about Government programs. A rule of estoppel might create not more reliable advice, but less advice. See *Hansen, supra*, at 788–789, and n. 5. The natural consequence of a rule that made the Government liable for the statements of its agents would be a decision to cut back and impose strict controls upon Government provision of information in order to limit liability. Not only would valuable informational programs be lost to the public, but the greatest impact of this loss would fall on those of limited means, who can least afford the alternative of

private advice. See Braunstein, In Defense of a Traditional Immunity—Toward an Economic Rationale for Not Estopping the Government, 14 Rutgers L. J. 1 (1982). The inevitable fact of occasional individual hardship cannot undermine the interest of the citizenry as a whole in the ready availability of Government information. The rationale of the Appropriations Clause is that if individual hardships are to be remedied by payment of Government funds, it must be at the instance of Congress.

Respondent points to no authority in precedent or history for the type of claim he advances today. Whether there are any extreme circumstances that might support estoppel in a case not involving payment from the Treasury is a matter we need not address. As for monetary claims, it is enough to say that this Court has never upheld an assertion of estoppel against the Government by a claimant seeking public funds. In this context there can be no estoppel, for courts cannot estop the Constitution. The judgment of the Court of Appeals is

Reversed.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, concurring.

I agree that the Government may not be estopped in cases such as this one and therefore join the opinion and judgment of the Court. I write separately to note two limitations to the Court's decision. First, the Court wisely does not decide that the Government may not be estopped under any circumstances. *Ante*, at 423. In my view, the case principally relied on by respondent, *United States* v. *Pennsylvania Industrial Chemical Corp.*, 411 U. S. 655 (1973) *(PICCO)*, may well have been decided on the basis of estoppel. But there is a world of difference between *PICCO* and this case: In *PICCO*, the courts were asked to prevent the Government from exercising its lawful discretionary authority in a particular case whereas here the courts have been asked to require the Executive Branch to violate a congressional stat-

ute. The Executive Branch does not have the dispensing power on its own, see *Kendall* v. *United States ex rel. Stokes*, 12 Pet. 524, 613 (1838), and should not be granted such a power by judicial authorization.

Second, although the Court states that "[a]ny exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury," *ante*, at 425, the Court does not state that statutory restrictions on appropriations may never fall even if they violate a command of the Constitution such as the Just Compensation Clause, cf. *Jacobs* v. *United States*, 290 U. S. 13 (1933), or if they encroach on the powers reserved to another branch of the Federal Government. Although *Knote* v. *United States*, 95 U. S. 149, 154 (1877), held that the President's pardon power did not extend to the appropriation of moneys in the Treasury without authorization by law for the benefit of pardoned criminals, it did not hold that Congress could impair the President's pardon power by denying him appropriations for pen and paper.

JUSTICE STEVENS, concurring in the judgment.

Although I join the Court's judgment, I cannot accept its reasoning. The Appropriations Clause of the Constitution has nothing to do with this case. Payments of pension benefits to retired and disabled federal servants are made "in Consequence of Appropriations made by Law" even if in particular cases they are the product of a mistaken interpretation of a statute or regulation. The Constitution contemplates appropriations that cover programs—not individual appropriations for individual payments. The Court's creative reliance on constitutional text is nothing but a red herring.

The dispute in this case is not about whether an appropriation has been made; it is instead about what rules govern administration of an appropriation that has been made. Once the issue is appropriately framed, it quickly becomes obvious

that the Court's resolution of it is untenable. Three hypothetical changes in the facts of this case will illustrate the error in the Court's approach. Assume, first, that the forfeiture involved a permanent and total loss of pension benefits rather than a 6-month hiatus. Suppose also that respondent was a disabled serviceman, totally incapable of productive work, who was promised that his benefits would be unaffected if he enlisted in the Reserve forces to show his continuing commitment to his country. Finally, assume that respondent was activated briefly for the sole purpose of enhancing his earnings, thereby depriving him of his pension permanently. Would the Court apply the harsh rule against estoppel that it announces today? I think not. Unless it found in the statute some unambiguous abrogation of estoppel principles, the Court would apply them to nullify the forfeiture. In doing so, the Court would construe the statute in a way consistent with congressional intent and would ensure that the Executive administered the funds appropriated in a manner consistent with the terms of the appropriation.

This case, however, does not involve such extreme facts. Respondent's loss of benefits was serious but temporary, and, even if we assume that respondent was not adequately compensated for the stress of his increased workload, his additional earnings certainly mitigated the shortfall in benefits. I agree with JUSTICE MARSHALL that there are strong equities favoring respondent's position, but I am persuaded that unless the 5-to-4 decision in *Federal Crop Ins. Corporation* v. *Merrill*, 332 U. S. 380 (1947), is repudiated by Congress or this Court, this kind of maladministration must be tolerated. I think the case is closer to *Schweiker* v. *Hansen*, 450 U. S. 785 (1981), and *Heckler* v. *Community Health Services of Crawford County, Inc.*, 467 U. S. 51 (1984), than to *Moser* v. *United States*, 341 U. S. 41 (1951), and *United States* v. *Pennsylvania Industrial Chemical Corp.*, 411 U. S. 655 (1973). Accordingly, I concur in the Court's judgment but not its opinion.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Respondent, a recipient of a federal disability annuity, was unsure whether he could accept limited overtime work without forfeiting his right to disability payments. He went to his former Government employer seeking an answer, asked the right questions, received an answer in the form of both oral advice and an official Government publication, and relied on that answer. Unfortunately, the publication the Government gave Richmond was years out of date, and the oral information was similarly erroneous. In this case, we must decide who should bear the burden of the Government's error.

The majority hints that it is unsympathetic to Richmond's claim that he was treated unfairly, *ante*, at 416, but it does not rule on that basis. Rather, the majority resolves the issue by holding as a general rule that a litigant may not succeed on a claim for payment of money from the Treasury in the absence of a statutory appropriation. Although the Constitution generally forbids payments from the Treasury without a congressional appropriation,* that proposition does not resolve this case. Most fundamentally, Richmond's collection of disability benefits would be fully consistent with the relevant appropriation. And even if the majority is correct that the statute cannot be construed to appropriate funds for claimants in Richmond's position, petitioner may nonetheless be estopped, on the basis of its prelitigation conduct, from arguing that the Appropriations Clause bars his recovery. Both the statutory construction and the estoppel arguments

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*The Court does not decide whether the Appropriations Clause would bar the Judiciary from ordering payments from the Treasury contrary to a statutory appropriation either where such payment would be required to remedy a violation of another constitutional provision, such as the Due Process or Just Compensation Clause, or where Congress' refusal to appropriate funds would violate separation of powers. See *ante*, at 434–435 (WHITE, J., concurring) (noting this limitation on the Court's holding).

turn on the equities, and the equities favor Richmond, see 862 F. 2d 294, 299 (CA Fed. 1988). I therefore dissent.

I

As the majority notes, the Appropriations Clause generally bars recovery from the Treasury unless the money sought "'has been appropriated by an act of Congress.'" *Ante*, at 424 (quoting *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, 321 (1937)). The majority acknowledges that Congress *has* appropriated funds to pay disability annuities in 5 U. S. C. § 8348(a), *ante*, at 424, but holds that the fund created is intended for the payment of benefits only "as provided by" law, *ante*, at 424 (quoting § 8348(a)(1)(A)). Section 8337(d) provides that a disability annuity terminates when the annuitant's earning capacity is restored and that such capacity is "deemed restored" if in any calendar year the annuitant makes more than 80% of the current rate of pay of the position he left. The majority contends on the basis of this provision that paying benefits to an annuitant who has exceeded the 80% limit would violate the Appropriations Clause because such benefits are not "provided by" the statute.

The Court need not read the statute so inflexibly, however. When Congress passes a law to provide a benefit to a class of people, it intends and assumes that the Executive will fairly implement that law. Where necessary to effectuate Congress' intent that its statutory schemes be fully implemented, this Court therefore often interprets the apparently plain words of a statute to allow a claimant to obtain relief where the statute on its face would bar recovery. Indeed, petitioner itself suggests that the Court was engaging in just such a brand of statutory interpretation in *Moser* v. *United States*, 341 U. S. 41, 47 (1951). Brief for Petitioner 40; Reply Brief for Petitioner 7. The relevant statute in *Moser* provided that a request by an alien for exemption from military service precluded him from becoming a citizen. 341 U. S., at 42–43, n. 5 (quoting 55 Stat. 845, 50 U. S. C. App.

§ 303(a) (1946 ed.)). The Court interpreted the statute to mean that, "as a matter of law, the statute imposed a valid condition on the claim of a neutral alien for exemption; petitioner had a choice of exemption and no citizenship, or no exemption and citizenship." 341 U. S., at 46. Moser was erroneously informed by the State Department that a claim for exemption would not bar him from later obtaining citizenship, and he relied on that advice. *Ibid.* In those circumstances, the Court decided, despite the absence of any such provision on the face of the statute, that "nothing less than an intelligent waiver [of the right to citizenship] is required by elementary fairness." *Id.*, at 47. The Court therefore held that Moser's claim for exemption did not bar him from later becoming a citizen.

Moser was not an aberration. Where strict adherence to the literal language of the statute would produce results that Congress would not have desired, this Court has interpreted other statutes to authorize equitable exceptions though the plain language of the statute suggested a contrary result. In *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385 (1982), for example, we held that a statute requiring that a plaintiff file a suit under Title VII of the Civil Rights Act of 1964 (Title VII) within 90 days of the alleged unlawful employment practice was "subject to waiver, estoppel, and equitable tolling." *Id.*, at 393 (footnote omitted). See also, *e. g.*, *Hallstrom* v. *Tillamook County*, 493 U. S. 20, 27 (1989). Similarly, in *Crown, Cork & Seal Co.* v. *Parker*, 462 U. S. 345 (1983), we interpreted Title VII's requirement that suits be filed within 90 days of receiving a notice of right to sue from the Equal Employment Opportunity Commission to be subject to tolling in appropriate circumstances, notwithstanding that the statute on its face did not allow exceptions. See also *Burnett* v. *New York Central R. Co.*, 380 U. S. 424 (1965) (limitations provision in Federal Employers' Liability Act is subject to tolling).

Respect for Congress' purposes in creating the federal disability annuity system and principles of elementary fairness require that we read the statute in this case as not barring Richmond's claim. Perhaps "[t]he equities do not weigh in favor of modifying statutory requirements when the procedural default is caused by petitioners' 'failure to take the minimal steps necessary' to preserve their claims." *Hallstrom*, *supra*, at 27–28 (quoting *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 466 (1975)). But the equities surely *do* weigh in favor of reading the disability annuity statute to authorize payment of the claim of an annuitant rendered ineligible for benefits by his reliance on misinformation from the responsible federal authorities. Cf. *Baldwin County Welcome Center* v. *Brown*, 466 U. S. 147, 151 (1984) (suggesting that a party should not be able to claim that a statute of limitations bars a suit "where affirmative misconduct on the part of a defendant lulled the plaintiff into inaction").

II

Even if the majority is correct that the statute does not itself require an exception where the Executive has misled a claimant, Richmond should still prevail. Although petitioner has an Appropriations Clause argument against any claim for money not authorized by a statutory appropriation, a court is not invariably required to entertain that argument. A number of circumstances may operate to estop the Government from invoking the Appropriations Clause in a particular case. For example, this Court's normal practice is to refuse to consider arguments not presented in the petition for certiorari. See, *e. g.*, *Radio Officers* v. *NLRB*, 347 U. S. 17, 37, n. 35 (1954). This Court customarily applies a similar rule to questions that were not raised in the Court of Appeals. See, *e. g.*, *Delta Air Lines, Inc.* v. *August*, 450 U. S. 346, 362 (1981). These rules apply to *all* arguments, even those of constitutional dimension. See, *e. g.*, *Holland* v. *Illinois*, 493 U. S. 474, 487, n. 3 (1990) (refusing to consider

equal protection claim on the ground that it was not presented in petition for certiorari). Thus, had petitioner failed to raise the argument on which it now prevails either in its petition for certiorari or in the Court of Appeals, we likely would have refused to consider it. Of course, we would have had the power to consider the claim. See, *e. g.*, *Teague* v. *Lane*, 489 U. S. 288, 300 (1989) (deciding case on basis of argument "raised only in an *amicus* brief"). We would not, however, have been obligated to do so.

The grounds on which a court may refuse to entertain an argument are many, but most have an equitable dimension. The courts' general refusal to consider arguments not raised by the parties, for example, is founded in part on the need to ensure that each party has fair notice of the arguments to which he must respond. Cf. *ibid.* (justifying departure from rule that arguments not raised by parties will not be considered in part on grounds that issue was raised in *amicus* brief and that argument was "not foreign to the parties, who have addressed [the argument] with respect to [another of petitioner's claims]"). Thus, the Appropriations Clause's bar against litigants' collection of money from the Treasury where payment is not authorized by statute may not be enforced in a particular case if a court determines that the equities counsel against entertaining the Government's Appropriations Clause argument.

The question here is thus similar to ones that we have posed and answered in any number of recent cases, see *ante*, at 421–422 (summarizing cases): should petitioner *in this case* be barred from invoking the statutory eligibility requirement (and through it, the Appropriations Clause) because Richmond's ineligibility for benefits was due entirely to the Government's own error? The majority refuses to answer this question. The Court of Appeals addressed it directly, concluding that the facts in this case were so "unusual and extreme" that petitioner should be estopped from applying the

statutory restrictions to bar Richmond's recovery. I agree with the Court of Appeals' ruling.

III

The majority argues that policy concerns justify its general refusal to apply estoppel against the Government in cases in which a claimant seeks unappropriated funds from the Treasury. Such a rule is necessary, says the majority, to protect against "fraud and corruption" by Executive Branch officials. *Ante*, at 427. If such officials are "displeased" with a statute, the argument goes, they may misinform the public as to the statute's meaning, thereby binding the Government to the officials' representations. *Ante*, at 428. The majority's concern with such dangers is undercut, however, by its observation that "Government agents attempt conscientious performance of their duties." *Ante*, at 433. The majority also contends that even if most claims of equitable estoppel are rejected in the end, "open[ing] the door" to such claims would impose "an unpredictable drain on the public fisc." *Ante*, at 433. The door has been open for almost 30 years, with an apparently unnoticeable drain on the public fisc. This reality is persuasive evidence that the majority's fears are overblown.

Significant policy concerns would of course be implicated by an indiscriminate use of estoppel against the Government. But estoppel is an equitable doctrine. As such, it can be tailored to the circumstances of particular cases, ensuring that fundamental injustices are avoided without seriously endangering the smooth operation of statutory schemes. In this case, the Federal Circuit undertook a thorough examination of the circumstances and concluded that denying Richmond his pension simply because he followed the Government's advice would be fundamentally unjust.

The majority does not reject the court's findings on the facts but rejects Richmond's claim on the theory that, except where the Constitution requires otherwise, see n., *supra*,

equitable estoppel may not be applied against the Government where the claimant seeks unappropriated funds from the Treasury. This Court has never so much as mentioned the Appropriations Clause in the context of a discussion of equitable estoppel, cf., *e. g.*, *Heckler* v. *Community Health Services of Crawford County, Inc.*, 467 U. S. 51, 60 (1984) (considering constitutional objections to applying estoppel against the Government in context of claim for payment from the Treasury contrary to an appropriation, but nowhere mentioning the Appropriations Clause), nor has the majority's theory ever before been discussed, much less adopted, by any court. This lack of precedent for the majority's position is not surprising because the Appropriations Clause does not speak either to the proper interpretation of any statute or to the question whether the Government should be estopped from invoking the Clause in a particular case. I dissent.

MICHIGAN DEPARTMENT OF STATE POLICE ET AL. *v.* SITZ ET AL.

CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

No. 88–1897. Argued February 27, 1990—Decided June 14, 1990

Petitioners, the Michigan State Police Department and its director, established a highway sobriety checkpoint program with guidelines governing checkpoint operations, site selection, and publicity. During the only operation to date, 126 vehicles passed through the checkpoint, the average delay per vehicle was 25 seconds, and two drivers were arrested for driving under the influence of alcohol. The day before that operation, respondents, licensed Michigan drivers, filed suit in a county court seeking declaratory and injunctive relief from potential subjection to the checkpoints. After a trial, at which the court heard extensive testimony concerning, among other things, the "effectiveness" of such programs, the court applied the balancing test of *Brown* v. *Texas*, 443 U. S. 47, and ruled that the State's program violated the Fourth Amendment. The State Court of Appeals affirmed, agreeing with the lower court's findings that the State has a "grave and legitimate" interest in curbing drunken driving; that sobriety checkpoint programs are generally ineffective and, therefore, do not significantly further that interest; and that, while the checkpoints' objective intrusion on individual liberties is slight, their "subjective intrusion" is substantial.

Held: Petitioners' highway sobriety checkpoint program is consistent with the Fourth Amendment. Pp. 448–455.

(a) *United States* v. *Martinez-Fuerte*, 428 U. S. 543—which utilized a balancing test in upholding checkpoints for detecting illegal aliens—and *Brown* v. *Texas*, *supra*, are the relevant authorities to be used in evaluating the constitutionality of the State's program. *Treasury Employees* v. *Von Raab*, 489 U. S. 656, was not designed to repudiate this Court's prior cases dealing with police stops of motorists on public highways and, thus, does not forbid the use of a balancing test here. Pp. 448–450.

(b) A Fourth Amendment "seizure" occurs when a vehicle is stopped at a checkpoint. See *Martinez-Fuerte*, *supra*, at 556. Thus, the question here is whether such seizures are "reasonable." P. 450.

(c) There is no dispute about the magnitude of, and the States' interest in eradicating, the drunken driving problem. The courts below accurately gauged the "objective" intrusion, measured by the seizure's duration and the investigation's intensity, as minimal. However, they

misread this Court's cases concerning the degree of "subjective intrusion" and the potential for generating fear and surprise. The "fear and surprise" to be considered are not the natural fear of one who has been drinking over the prospect of being stopped at a checkpoint but, rather, the fear and surprise engendered in law-abiding motorists by the nature of the particular stop, such as one made by a roving patrol operating on a seldom-traveled road. Here, checkpoints are selected pursuant to guidelines, and uniformed officers stop every vehicle. The resulting intrusion is constitutionally indistinguishable from the stops upheld in *Martinez-Fuerte*. Pp. 451–453.

(d) The Court of Appeals also erred in finding that the program failed the "effectiveness" part of the *Brown* test. This balancing factor—which *Brown* actually describes as "the degree to which the seizure advances the public interest"—was not meant to transfer from politically accountable officials to the courts the choice as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger. Moreover, the court mistakenly relied on *Martinez-Fuerte*, *supra*, and *Delaware* v. *Prouse*, 440 U. S. 648, to provide a basis for its "effectiveness" review. Unlike *Delaware* v. *Prouse*, this case involves neither random stops nor a complete absence of empirical data indicating that the stops would be an effective means of promoting roadway safety. And there is no justification for a different conclusion here than in *Martinez-Fuerte*, where the ratio of illegal aliens detected to vehicles stopped was approximately 0.5 percent, as compared with the approximately 1.6 percent detection ratio in the one checkpoint conducted by Michigan and with the 1 percent ratio demonstrated by other States' experience. Pp. 453–455.

170 Mich. App. 433, 429 N. W. 2d 180, reversed and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 455. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 456. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined as to Parts I and II, *post*, p. 460.

Thomas L. Casey, Assistant Solicitor General of Michigan, argued the cause for petitioners. With him on the briefs were *Frank J. Kelley*, Attorney General, *Louis J. Caruso*, Solicitor General, and *Patrick J. O'Brien*, Assistant Attorney General.

Stephen L. Nightingale argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Dennis*, and *Deputy Solicitor General Bryson*.

Mark Granzotto argued the cause for respondents. With him on the brief were *Deborah L. Gordon*, *William C. Gage*, and *John A. Powell*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of California et al. by *John K. Van de Kamp*, Attorney General of California, *Richard B. Iglehart*, Chief Assistant Attorney General, *John H. Sugiyama*, Senior Assistant Attorney General, *Morris Beatus*, Supervising Deputy Attorney General, and *Ronald E. Niver*, Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Robert A. Butterworth* of Florida, *Lacy H. Thornburg* of North Carolina, and *James M. Shannon* of Massachusetts; for the State of Illinois et al. by *Neil F. Hartigan*, Attorney General of Illinois, *Robert J. Ruiz*, Solicitor General, and *Terence M. Madsen*, *Marcia L. Friedl*, and *Michael J. Singer*, Assistant Attorneys General, *Don Siegelman*, Attorney General of Alabama, *Steve Clark*, Attorney General of Arkansas, *Duane Woodard*, Attorney General of Colorado, *Clarine Nardi Riddle*, Acting Attorney General of Connecticut, *Charles M. Oberly III*, Attorney General of Delaware, *Michael J. Bowers*, Attorney General of Georgia, *Jim Jones*, Attorney General of Idaho, *Tom Miller*, Attorney General of Iowa, *Robert T. Stephan*, Attorney General of Kansas, *Frederic J. Cowan*, Attorney General of Kentucky, *James E. Tierney*, Attorney General of Maine, *J. Joseph Curran, Jr.*, Attorney General of Maryland, *Hubert H. Humphrey III*, Attorney General of Minnesota, *William L. Webster*, Attorney General of Missouri, *Marc Racicot*, Attorney General of Montana, *John P. Arnold*, Attorney General of New Hampshire, *Peter N. Perretti, Jr.*, Attorney General of New Jersey, *Hal Stratton*, Attorney General of New Mexico, *Robert Abrams*, Attorney General of New York, *Lacy H. Thornburg*, Attorney General of North Carolina, *Nicholas Spaeth*, Attorney General of North Dakota, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *T. Travis Medlock*, Attorney General of South Carolina, *Roger A. Tellinghuisen*, Attorney General of South Dakota, *Mary Sue Terry*, Attorney General of Virginia, and *Joseph B. Meyer*, Attorney General of Wyoming; for American Alliance for Rights and Responsibilities, Inc., et al. by *Richard A. Rossman* and *Abraham Singer*; for the Insurance Institute for Highway Safety et al. by *Michele McDowell Fields*, *Andrew R. Hricko*, *Stephen L. Oesch*, and *Ronald G. Precup*; for the National Governors' Association et al. by *Benna Ruth Solomon*, *Andrew L. Frey*, and *Erika*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

This case poses the question whether a State's use of highway sobriety checkpoints violates the Fourth and Fourteenth Amendments to the United States Constitution. We hold that it does not and therefore reverse the contrary holding of the Court of Appeals of Michigan.

Petitioners, the Michigan Department of State Police and its director, established a sobriety checkpoint pilot program in early 1986. The director appointed a Sobriety Checkpoint Advisory Committee comprising representatives of the State Police force, local police forces, state prosecutors, and the University of Michigan Transportation Research Institute. Pursuant to its charge, the advisory committee created guidelines setting forth procedures governing checkpoint operations, site selection, and publicity.

Under the guidelines, checkpoints would be set up at selected sites along state roads. All vehicles passing through a checkpoint would be stopped and their drivers briefly examined for signs of intoxication. In cases where a checkpoint officer detected signs of intoxication, the motorist would be directed to a location out of the traffic flow where an officer would check the motorist's driver's license and car registration and, if warranted, conduct further sobriety tests. Should the field tests and the officer's observations suggest that the driver was intoxicated, an arrest would be made. All other drivers would be permitted to resume their journey immediately.

Z. Jones; for the Washington Legal Foundation et al. by *Richard K. Willard, Daniel J. Popeo,* and *Paul D. Kamenar;* and for the Michigan State Chapters of Mothers Against Drunk Driving by *Michael B. Rizik, Jr.*

Briefs of *amici curiae* were filed for the American Federation of Labor and Congress of Industrial Organizations by *Walter Kamiat* and *Laurence Gold;* for the Appellate Committee of the California District Attorneys Association by *Ira Reiner, Harry B. Sondheim,* and *Dirk L. Hudson;* and for the National Organization of Mothers Against Drunk Driving by *David Bryant* and *Eric R. Cromartie.*

The first—and to date the only—sobriety checkpoint operated under the program was conducted in Saginaw County with the assistance of the Saginaw County Sheriff's Department. During the 75-minute duration of the checkpoint's operation, 126 vehicles passed through the checkpoint. The average delay for each vehicle was approximately 25 seconds. Two drivers were detained for field sobriety testing, and one of the two was arrested for driving under the influence of alcohol. A third driver who drove through without stopping was pulled over by an officer in an observation vehicle and arrested for driving under the influence.

On the day before the operation of the Saginaw County checkpoint, respondents filed a complaint in the Circuit Court of Wayne County seeking declaratory and injunctive relief from potential subjection to the checkpoints. Each of the respondents "is a licensed driver in the State of Michigan . . . who regularly travels throughout the State in his automobile." See Complaint, App. 3a–4a. During pretrial proceedings, petitioners agreed to delay further implementation of the checkpoint program pending the outcome of this litigation.

After the trial, at which the court heard extensive testimony concerning, *inter alia*, the "effectiveness" of highway sobriety checkpoint programs, the court ruled that the Michigan program violated the Fourth Amendment and Art. 1, § 11, of the Michigan Constitution. App. to Pet. for Cert. 132a. On appeal, the Michigan Court of Appeals affirmed the holding that the program violated the Fourth Amendment and, for that reason, did not consider whether the program violated the Michigan Constitution. 170 Mich. App. 433, 445, 429 N. W. 2d 180, 185 (1988). After the Michigan Supreme Court denied petitioners' application for leave to appeal, we granted certiorari. 493 U. S. 806 (1989).

To decide this case the trial court performed a balancing test derived from our opinion in *Brown* v. *Texas*, 443 U. S. 47 (1979). As described by the Court of Appeals, the test in-

volved "balancing the state's interest in preventing accidents caused by drunk drivers, the effectiveness of sobriety checkpoints in achieving that goal, and the level of intrusion on an individual's privacy caused by the checkpoints." 170 Mich. App., at 439, 429 N. W. 2d, at 182 (citing *Brown*, *supra*, at 50–51). The Court of Appeals agreed that "the *Brown* three-prong balancing test was the correct test to be used to determine the constitutionality of the sobriety checkpoint plan." 170 Mich. App., at 439, 429 N. W. 2d, at 182.

As characterized by the Court of Appeals, the trial court's findings with respect to the balancing factors were that the State has "a grave and legitimate" interest in curbing drunken driving; that sobriety checkpoint programs are generally "ineffective" and, therefore, do not significantly further that interest; and that the checkpoints' "subjective intrusion" on individual liberties is substantial. *Id.*, at 439, 440, 429 N. W. 2d, at 183, 184. According to the court, the record disclosed no basis for disturbing the trial court's findings, which were made within the context of an analytical framework prescribed by this Court for determining the constitutionality of seizures less intrusive than traditional arrests. *Id.*, at 445, 429 N. W. 2d, at 185.

In this Court respondents seek to defend the judgment in their favor by insisting that the balancing test derived from *Brown* v. *Texas*, *supra*, was not the proper method of analysis. Respondents maintain that the analysis must proceed from a basis of probable cause or reasonable suspicion, and rely for support on language from our decision last Term in *Treasury Employees* v. *Von Raab*, 489 U. S. 656 (1989). We said in *Von Raab:*

> "[W]here a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant

or some level of individualized suspicion in the particular context." *Id.*, at 665–666.

Respondents argue that there must be a showing of some special governmental need "beyond the normal need" for criminal law enforcement before a balancing analysis is appropriate, and that petitioners have demonstrated no such special need.

But it is perfectly plain from a reading of *Von Raab*, which cited and discussed with approval our earlier decision in *United States* v. *Martinez-Fuerte*, 428 U. S. 543 (1976), that it was in no way designed to repudiate our prior cases dealing with police stops of motorists on public highways. *Martinez-Fuerte*, *supra*, which utilized a balancing analysis in approving highway checkpoints for detecting illegal aliens, and *Brown* v. *Texas*, *supra*, are the relevant authorities here.

Petitioners concede, correctly in our view, that a Fourth Amendment "seizure" occurs when a vehicle is stopped at a checkpoint. Tr. of Oral Arg. 11; see *Martinez-Fuerte*, *supra*, at 556 ("It is agreed that checkpoint stops are 'seizures' within the meaning of the Fourth Amendment"); *Brower* v. *County of Inyo*, 489 U. S. 593, 597 (1989) (Fourth Amendment seizure occurs "when there is a governmental termination of freedom of movement *through means intentionally applied*" (emphasis in original)). The question thus becomes whether such seizures are "reasonable" under the Fourth Amendment.

It is important to recognize what our inquiry is *not* about. No allegations are before us of unreasonable treatment of any person after an actual detention at a particular checkpoint. See *Martinez-Fuerte*, 428 U. S., at 559 ("[C]laim that a particular exercise of discretion in locating or operating a checkpoint is unreasonable is subject to post-stop judicial review"). As pursued in the lower courts, the instant action challenges only the use of sobriety checkpoints generally. We address only the initial stop of each motorist passing through a checkpoint and the associated preliminary questioning and ob-

servation by checkpoint officers. Detention of particular motorists for more extensive field sobriety testing may require satisfaction of an individualized suspicion standard. *Id.*, at 567.

No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation's roads are legion. The anecdotal is confirmed by the statistical. "Drunk drivers cause an annual death toll of over 25,000[*] and in the same time span cause nearly one million personal injuries and more than five billion dollars in property damage." 4 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 10.8(d), p. 71 (2d ed. 1987). For decades, this Court has "repeatedly lamented the tragedy." *South Dakota* v. *Neville*, 459 U. S. 553, 558 (1983); see *Breithaupt* v. *Abram*, 352 U. S. 432, 439 (1957) ("The increasing slaughter on our highways . . . now reaches the astounding figures only heard of on the battlefield").

Conversely, the weight bearing on the other scale—the measure of the intrusion on motorists stopped briefly at sobriety checkpoints—is slight. We reached a similar conclusion as to the intrusion on motorists subjected to a brief stop at a highway checkpoint for detecting illegal aliens. See *Martinez-Fuerte*, *supra*, at 558. We see virtually no difference between the levels of intrusion on law-abiding motorists

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*Statistical evidence incorporated in JUSTICE STEVENS' dissent suggests that this figure declined between 1982 and 1988. See *post*, at 460–461, n. 2, and 467–468, n. 7 (citing U. S. Dept. of Transportation, National Highway Traffic Safety Administration, Fatal Accident Reporting System 1988). It was during this same period that police departments experimented with sobriety checkpoint systems. Petitioners, for instance, operated their checkpoint in May 1986, see App. to Pet. for Cert. 6a, and the Maryland State Police checkpoint program, about which much testimony was given before the trial court, began in December 1982. See *id*, at 84a. Indeed, it is quite possible that jurisdictions which have recently decided to implement sobriety checkpoint systems have relied on such data from the 1980's in assessing the likely utility of such checkpoints.

from the brief stops necessary to the effectuation of these two types of checkpoints, which to the average motorist would seem identical save for the nature of the questions the checkpoint officers might ask. The trial court and the Court of Appeals, thus, accurately gauged the "objective" intrusion, measured by the duration of the seizure and the intensity of the investigation, as minimal. See 170 Mich. App., at 444, 429 N. W. 2d, at 184.

With respect to what it perceived to be the "subjective" intrusion on motorists, however, the Court of Appeals found such intrusion substantial. See *supra*, at 449. The court first affirmed the trial court's finding that the guidelines governing checkpoint operation minimize the discretion of the officers on the scene. But the court also agreed with the trial court's conclusion that the checkpoints have the potential to generate fear and surprise in motorists. This was so because the record failed to demonstrate that approaching motorists would be aware of their option to make U-turns or turnoffs to avoid the checkpoints. On that basis, the court deemed the subjective intrusion from the checkpoints unreasonable. *Id.*, at 443–444, 429 N. W. 2d, at 184–185.

We believe the Michigan courts misread our cases concerning the degree of "subjective intrusion" and the potential for generating fear and surprise. The "fear and surprise" to be considered are not the natural fear of one who has been drinking over the prospect of being stopped at a sobriety checkpoint but, rather, the fear and surprise engendered in law-abiding motorists by the nature of the stop. This was made clear in *Martinez-Fuerte*. Comparing checkpoint stops to roving patrol stops considered in prior cases, we said:

> "[W]e view checkpoint stops in a different light because the subjective intrusion—the generating of concern or even fright on the part of lawful travelers—is appreciably less in the case of a checkpoint stop. In [*United States* v.] *Ortiz*, [422 U. S. 891 (1975),] we noted:

> "'[T]he circumstances surrounding a checkpoint stop and search are far less intrusive than those attending a roving-patrol stop. Roving patrols often operate at night on seldom-traveled roads, and their approach may frighten motorists. At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion. 422 U. S., at 894–895.'" *Martinez-Fuerte*, 428 U. S., at 558.

See also *id*, at 559. Here, checkpoints are selected pursuant to the guidelines, and uniformed police officers stop every approaching vehicle. The intrusion resulting from the brief stop at the sobriety checkpoint is for constitutional purposes indistinguishable from the checkpoint stops we upheld in *Martinez-Fuerte*.

The Court of Appeals went on to consider as part of the balancing analysis the "effectiveness" of the proposed checkpoint program. Based on extensive testimony in the trial record, the court concluded that the checkpoint program failed the "effectiveness" part of the test, and that this failure materially discounted petitioners' strong interest in implementing the program. We think the Court of Appeals was wrong on this point as well.

The actual language from *Brown* v. *Texas*, upon which the Michigan courts based their evaluation of "effectiveness," describes the balancing factor as "the degree to which the seizure advances the public interest." 443 U. S., at 51. This passage from *Brown* was not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger. Experts in police science might disagree over which of several methods of apprehending drunken drivers is preferrable as an ideal. But for purposes of Fourth Amendment analysis, the choice among such reasonable alternatives

remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers. *Brown*'s rather general reference to "the degree to which the seizure advances the public interest" was derived, as the opinion makes clear, from the line of cases culminating in *Martinez-Fuerte*, *supra*. Neither *Martinez-Fuerte* nor *Delaware* v. *Prouse*, 440 U. S. 648 (1979), however, the two cases cited by the Court of Appeals as providing the basis for its "effectiveness" review, see 170 Mich. App., at 442, 429 N. W. 2d, at 183, supports the searching examination of "effectiveness" undertaken by the Michigan court.

In *Delaware* v. *Prouse*, *supra*, we disapproved random stops made by Delaware Highway Patrol officers in an effort to apprehend unlicensed drivers and unsafe vehicles. We observed that *no* empirical evidence indicated that such stops would be an effective means of promoting roadway safety and said that "[i]t seems common sense that the percentage of all drivers on the road who are driving without a license is very small and that the number of licensed drivers who will be stopped in order to find one unlicensed operator will be large indeed." *Id.*, at 659–660. We observed that the random stops involved the "kind of standardless and unconstrained discretion [which] is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent." *Id.*, at 661. We went on to state that our holding did not "cast doubt on the permissibility of roadside truck weigh-stations and inspection checkpoints, at which some vehicles may be subject to further detention for safety and regulatory inspection than are others." *Id.*, at 663, n. 26.

Unlike *Prouse*, this case involves neither a complete absence of empirical data nor a challenge to random highway stops. During the operation of the Saginaw County checkpoint, the detention of the 126 vehicles that entered the checkpoint resulted in the arrest of two drunken drivers.

Stated as a percentage, approximately 1.6 percent of the drivers passing through the checkpoint were arrested for alcohol impairment. In addition, an expert witness testified at the trial that experience in other States demonstrated that, on the whole, sobriety checkpoints resulted in drunken driving arrests of around 1 percent of all motorists stopped. 170 Mich. App., at 441, 429 N. W. 2d, at 183. By way of comparison, the record from one of the consolidated cases in *Martinez-Fuerte* showed that in the associated checkpoint, illegal aliens were found in only 0.12 percent of the vehicles passing through the checkpoint. See 428 U. S., at 554. The ratio of illegal aliens detected to vehicles stopped (considering that on occasion two or more illegal aliens were found in a single vehicle) was approximately 0.5 percent. See *ibid.* We concluded that this "record . . . provides a rather complete picture of the effectiveness of the San Clemente checkpoint," *ibid.*, and we sustained its constitutionality. We see no justification for a different conclusion here.

In sum, the balance of the State's interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state program. We therefore hold that it is consistent with the Fourth Amendment. The judgment of the Michigan Court of Appeals is accordingly reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, concurring in the judgment.

I concur only in the judgment.

I fully agree with the Court's lamentations about the slaughter on our highways and about the dangers posed to almost everyone by the driver who is under the influence of alcohol or other drug. I add this comment only to remind the Court that it has been almost 20 years since, in *Perez* v.

Campbell, 402 U. S. 637, 657 (1971), in writing for three others (no longer on the Court) and myself, I noted that the "slaughter on the highways of this Nation exceeds the death toll of all our wars," and that I detected "little genuine public concern about what takes place in our very midst and on our daily travel routes." See also *Tate* v. *Short*, 401 U. S. 395, 401 (1971) (concurring statement). And in the Appendix to my writing in *Perez*, 402 U. S., at 672, I set forth official figures to the effect that for the period from 1900 through 1969 motor-vehicle deaths in the United States exceeded the death toll of all our wars. I have little doubt that those figures, when supplemented for the two decades since 1969, would disclose an even more discouraging comparison. I am pleased, of course, that the Court is now stressing this tragic aspect of American life. See *ante*, at 451.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Today, the Court rejects a Fourth Amendment challenge to a sobriety checkpoint policy in which police stop all cars and inspect all drivers for signs of intoxication without *any* individualized suspicion that a specific driver is intoxicated. The Court does so by balancing "the State's interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped." *Ante*, at 455. For the reasons stated by JUSTICE STEVENS in Parts I and II of his dissenting opinion, I agree that the Court misapplies that test by undervaluing the nature of the intrusion and exaggerating the law enforcement need to use the roadblocks to prevent drunken driving. See also *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 567 (1976) (BRENNAN, J., dissenting). I write separately to express a few additional points.

The majority opinion creates the impression that the Court generally engages in a balancing test in order to determine

the constitutionality of all seizures, or at least those "dealing with police stops of motorists on public highways." *Ante*, at 450. This is not the case. In most cases, the police must possess probable cause for a seizure to be judged reasonable. See *Dunaway* v. *New York*, 442 U. S. 200, 209 (1979). Only when a seizure is "*substantially* less intrusive," *id.*, at 210 (emphasis added), than a typical arrest is the general rule replaced by a balancing test. I agree with the Court that the initial stop of a car at a roadblock under the Michigan State Police sobriety checkpoint policy is sufficiently less intrusive than an arrest so that the reasonableness of the seizure may be judged, not by the presence of probable cause, but by balancing "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Brown* v. *Texas*, 443 U. S. 47, 51 (1979). But one searches the majority opinion in vain for any acknowledgment that the *reason* for employing the balancing test is that the seizure is minimally intrusive.

Indeed, the opinion reads as if the minimal nature of the seizure *ends* rather than begins the inquiry into reasonableness. Once the Court establishes that the seizure is "slight," *ante*, at 451, it asserts without explanation that the balance "weighs in favor of the state program." *Ante*, at 455. The Court ignores the fact that in this class of minimally intrusive searches, we have generally required the government to prove that it had reasonable suspicion for a minimally intrusive seizure to be considered reasonable. See, *e. g.*, *Delaware* v. *Prouse*, 440 U. S. 648, 661 (1979); *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 882–883 (1975); *Terry* v. *Ohio*, 392 U. S. 1, 27 (1968). Some level of individualized suspicion is a core component of the protection the Fourth Amendment provides against arbitrary government action. See *Prouse*, *supra*, at 654–655; *Martinez-Fuerte*, *supra*, at 577 (BRENNAN, J., dissenting) ("Action based merely on

whatever may pique the curiousity of a particular officer is the antithesis of the objective standards requisite to reasonable conduct and to avoiding abuse and harassment"). By holding that no level of suspicion is necessary before the police may stop a car for the purpose of preventing drunken driving, the Court potentially subjects the general public to arbitrary or harassing conduct by the police. I would have hoped that before taking such a step, the Court would carefully explain how such a plan fits within our constitutional framework.

Presumably, the Court purports to draw support from *Martinez-Fuerte*, *supra*, which is the only case in which the Court has upheld a program that subjects the general public to suspicionless seizures. But as JUSTICE STEVENS demonstrates, *post*, at 463–466, 471–472, the Michigan State Police policy is sufficiently different from the progam at issue in *Martinez-Fuerte* that such reliance is unavailing. Moreover, even if the policy at issue here were comparable to the program at issue in *Martinez-Fuerte*, it does not follow that the balance of factors in this case also justifies abandoning a requirement of individualized suspicion. In *Martinez-Fuerte*, the Court explained that suspicionless stops were justified since "[a] requirement that stops . . . be based on reasonable suspicion would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens." 428 U. S., at 557. There has been no showing in this case that there is a similar difficulty in detecting individuals who are driving under the influence of alcohol, nor is it intuitively obvious that such a difficulty exists. See *Prouse*, *supra*, at 661. That stopping every car *might* make it easier to prevent drunken driving, but see *post*, at 469–471, is an insufficient justification for abandoning the requirement of individualized suspicion. "The needs of law enforcement stand in constant tension with the Constitution's protections

of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards." *Almeida-Sanchez* v. *United States*, 413 U. S. 266, 273 (1973). Without proof that the police cannot develop individualized suspicion that a person is driving while impaired by alcohol, I believe the constitutional balance must be struck in favor of protecting the public against even the "minimally intrusive" seizures involved in this case.

I do not dispute the immense social cost caused by drunken drivers, nor do I slight the government's efforts to prevent such tragic losses. Indeed, I would hazard a guess that today's opinion will be received favorably by a majority of our society, who would willingly suffer the minimal intrusion of a sobriety checkpoint stop in order to prevent drunken driving. But consensus that a particular law enforcement technique serves a laudable purpose has never been the touchstone of constitutional analysis.

> "The Fourth Amendment was designed not merely to protect against official intrusions whose social utility was less as measured by some 'balancing test' than its intrusion on individual privacy; it was designed in addition to grant the individual a zone of privacy whose protections could be breached only where the 'reasonable' requirements of the probable-cause standard were met. Moved by whatever momentary evil has aroused their fears, officials—perhaps even supported by a majority of citizens—may be tempted to conduct searches that sacrifice the liberty of each citizen to assuage the perceived evil. But the Fourth Amendment rests on the principle that a true balance between the individual and society depends on the recognition of 'the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.' *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting)." *New Jersey*

v. *T. L. O.*, 469 U. S. 325, 361–362 (1985) (BRENNAN, J., concurring in part and dissenting in part) (footnote omitted).

In the face of the "momentary evil" of drunken driving, the Court today abdicates its role as the protector of that fundamental right. I respectfully dissent.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join as to Parts I and II, dissenting.

A sobriety checkpoint is usually operated at night at an unannounced location. Surprise is crucial to its method. The test operation conducted by the Michigan State Police and the Saginaw County Sheriff's Department began shortly after midnight and lasted until about 1 a.m. During that period, the 19 officers participating in the operation made two arrests and stopped and questioned 124 other unsuspecting and innocent drivers.[1] It is, of course, not known how many arrests would have been made during that period if those officers had been engaged in normal patrol activities. However, the findings of the trial court, based on an extensive record and affirmed by the Michigan Court of Appeals, indicate that the net effect of sobriety checkpoints on traffic safety is infinitesimal and possibly negative.

Indeed, the record in this case makes clear that a decision holding these suspicionless seizures unconstitutional would not impede the law enforcement community's remarkable progress in reducing the death toll on our highways.[2] Be-

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[1] The 19 officers present at the sole Michigan checkpoint were not the standard detail; a few were observers. Nevertheless, the standard plan calls for having at least 8 and as many as 12 officers on hand. 1 Record 82–83.

[2] The fatality rate per 100 million miles traveled has steadily declined from 5.2 in 1968 to 2.3 in 1988. During the same span, the absolute number of fatalities also decreased, albeit less steadily, from more than 52,000 in 1968 to appoximately 47,000 in 1988. U. S. Dept. of Transportation, National Highway Traffic Safety Administration, Fatal Accident Report-

cause the Michigan program was patterned after an older program in Maryland, the trial judge gave special attention to that State's experience. Over a period of several years, Maryland operated 125 checkpoints; of the 41,000 motorists passing through those checkpoints, only 143 persons (0.3%) were arrested.[3] The number of man-hours devoted to these

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ing System 1988, Ch. 1, p. 6 (Dec. 1989) (hereinafter Fatal Accident Reporting System 1988).

Alcohol remains a substantial cause of these accidents, but progress has been made on this front as well:

"Since 1982, alcohol use by drivers in fatal crashes has steadily decreased. The proportion of all drivers who were estimated to have been legally intoxicated ([blood alcohol concentration] of .10 or greater) dropped from 30% in 1982 to 24.6% in 1988. The reduction from 1982–1988 is 18%.

"The proportion of fatally injured drivers who were legally intoxicated dropped from 43.8% in 1982 to 37.5% in 1988—a 14% decrease.

"During the past seven years, the proportion of drivers involved in fatal crashes who were intoxicated decreased in all age groups. The most significant drop continues to be in the 15 to 19 year old age group. In 1982, NHTSA estimated that 28.4% of these teenaged drivers in fatal crashes were drunk, compared with 18.3% in 1988." *Id.*, Overview, p. 2.

All of these improvements have been achieved despite resistance—now ebbing at last—to the use of airbags and other passive restraints, improvements that would almost certainly result in even more dramatic reductions in the fatality rate. Indeed, the National Highway Traffic Safety Administration estimates that an additional 5,000 lives per year would be saved if the 21 States without mandatory safety belt usage laws were to enact such legislation—even though only 50% of motorists obey such laws. *Id.*, Overview, p. 4, Ch. 2, p. 13.

[3] App. to Pet. for Cert. 80a–81a. The figures for other States are roughly comparable. See, *e. g.*, *State ex rel. Ekstrom* v. *Justice Ct.*, 136 Ariz. 1, 2, 663 P. 2d 992, 993 (1983) (5,763 cars stopped, 14 persons arrested for drunken driving); *Ingersoll* v. *Palmer*, 43 Cal. 3d 1321, 1327, 743 P. 2d 1299, 1303 (1987) (233 vehicles screened, no arrests for drunken driving); *State* v. *Garcia*, 481 N. E. 2d 148, 150 (Ind. App. 1985) (100 cars stopped, seven arrests for drunken driving made in two hours of operation); *State* v. *McLaughlin*, 471 N. E. 2d 1125, 1137 (Ind. App. 1984) (115 cars stopped, three arrests for drunken driving); *State* v. *Deskins*, 234 Kan. 529, 545, 673 P. 2d 1174, 1187 (1983) (Prager, J., dissenting) (2,000 to 3,000 vehicles stopped, 15 arrests made, 140 police man-hours consumed); *Commonwealth* v. *Trumble*, 396 Mass. 81, 85, 483 N. E. 2d 1102, 1105

operations is not in the record, but it seems inconceivable that a higher arrest rate could not have been achieved by more conventional means.[4] Yet, even if the 143 checkpoint arrests were assumed to involve a net increase in the number of drunken driving arrests per year, the figure would still be insignificant by comparison to the 71,000 such arrests made by Michigan State Police without checkpoints in 1984 alone. See App. to Pet. for Cert. 97a.

Any relationship between sobriety checkpoints and an actual reduction in highway fatalities is even less substantial than the minimal impact on arrest rates. As the Michigan Court of Appeals pointed out: "Maryland had conducted a study comparing traffic statistics between a county using checkpoints and a control county. The results of the study showed that alcohol-related accidents in the checkpoint county decreased by ten percent, whereas the control county saw an eleven percent decrease; and while fatal accidents in the control county fell from sixteen to three, fatal accidents in the checkpoint county actually doubled from the prior year." 170 Mich. App. 433, 443, 429 N. W. 2d 180, 184 (1988).

In light of these considerations, it seems evident that the Court today misapplies the balancing test announced in *Brown* v. *Texas*, 443 U. S. 47, 50–51 (1979). The Court overvalues the law enforcement interest in using sobriety checkpoints, undervalues the citizen's interest in freedom from random, unannounced investigatory seizures, and mistakenly assumes that there is "virtually no difference" between a routine stop at a permanent, fixed checkpoint and a

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(1985) (503 cars stopped, eight arrests, 13 participating officers); *State* v. *Koppel*, 127 N. H. 286, 288, 499 A. 2d 977, 979 (1985) (1,680 vehicles stopped, 18 arrests for driving while intoxicated).

[4] "The then sheriffs of Macomb County, Kalamazoo County, and Wayne County all testified as to other means used in their counties to combat drunk driving and as to their respective opinions that other methods currently in use, e. g., patrol cars, were more effective means of combating drunk driving and utilizing law enforcement resources than sobriety checkpoints." 170 Mich. App. 433, 443, 429 N. W. 2d 180, 184 (1988).

surprise stop at a sobriety checkpoint. I believe this case is controlled by our several precedents condemning suspicionless random stops of motorists for investigatory purposes. *Delaware* v. *Prouse*, 440 U. S. 648 (1979); *United States* v. *Brignoni-Ponce*, 422 U. S. 873 (1975); *United States* v. *Ortiz*, 422 U. S. 891 (1975); *Almeida-Sanchez* v. *United States*, 413 U. S. 266 (1973); cf. *Carroll* v. *United States*, 267 U. S. 132, 153–154 (1925).

I

There is a critical difference between a seizure that is preceded by fair notice and one that is effected by surprise. See *Wyman* v. *James*, 400 U. S. 309, 320–321 (1971); *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 559 (1976); *Michigan* v. *Tyler*, 436 U. S. 499, 513–514 (1978) (STEVENS, J., concurring in part and concurring in judgment). That is one reason why a border search, or indeed any search at a permanent and fixed checkpoint, is much less intrusive than a random stop. A motorist with advance notice of the location of a permanent checkpoint has an opportunity to avoid the search entirely, or at least to prepare for, and limit, the intrusion on her privacy.

No such opportunity is available in the case of a random stop or a temporary checkpoint, which both depend for their effectiveness on the element of surprise. A driver who discovers an unexpected checkpoint on a familiar local road will be startled and distressed. She may infer, correctly, that the checkpoint is not simply "business as usual," and may likewise infer, again correctly, that the police have made a discretionary decision to focus their law enforcement efforts upon her and others who pass the chosen point.

This element of surprise is the most obvious distinction between the sobriety checkpoints permitted by today's majority and the interior border checkpoints approved by this Court in *Martinez-Fuerte*. The distinction casts immediate doubt upon the majority's argument, for *Martinez-Fuerte* is the only case in which we have upheld suspicionless seizures

of motorists. But the difference between notice and surprise is only one of the important reasons for distinguishing between permanent and mobile checkpoints. With respect to the former, there is no room for discretion in either the timing or the location of the stop—it is a permanent part of the landscape. In the latter case, however, although the checkpoint is most frequently employed during the hours of darkness on weekends (because that is when drivers with alcohol in their blood are most apt to be found on the road), the police have extremely broad discretion in determining the exact timing and placement of the roadblock.[5]

There is also a significant difference between the kind of discretion that the officer exercises after the stop is made. A check for a driver's license, or for identification papers at an immigration checkpoint, is far more easily standardized than is a search for evidence of intoxication. A Michigan officer who questions a motorist at a sobriety checkpoint has virtually unlimited discretion to detain the driver on the basis

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[5] The Michigan plan provides that locations should be selected after consideration of "previous alcohol and drug experience per time of day and day of week as identified by arrests and/or Michigan Accident Location Index data," App. to Pet. for Cert. 148a, and that "specific site selection" should be based on the following criteria:

"1. Safety of the location for citizens and law enforcement personnel. The site selected shall have a safe area for stopping a driver and must afford oncoming traffic sufficient sight distance for the driver to safely come to a stop upon approaching the checkpoint.

"2. The location must ensure minimum inconvenience for the driver and facilitate the safe stopping of traffic in one direction during the pilot program.

"3. Roadway choice must ensure that sufficient adjoining space is available to pull the vehicle off the traveled portion of the roadway for further inquiry if necessary.

"4. Consideration should be given to the physical space requirements as shown in Appendixes 'A' and 'B.'" *Id.*, at 149a–150a.

Although these criteria are not as open-ended as those used in *Delaware* v. *Prouse*, 440 U. S. 648 (1979), they certainly would permit the police to target an extremely wide variety of specific locations.

of the slightest suspicion. A ruddy complexion, an unbuttoned shirt, bloodshot eyes, or a speech impediment may suffice to prolong the detention. Any driver who had just consumed a glass of beer, or even a sip of wine, would almost certainly have the burden of demonstrating to the officer that his or her driving ability was not impaired.[6]

Finally, it is significant that many of the stops at permanent checkpoints occur during daylight hours, whereas the sobriety checkpoints are almost invariably operated at night. A seizure followed by interrogation and even a cursory search at night is surely more offensive than a daytime stop that is almost as routine as going through a tollgate. Thus we thought it important to point out that the random stops at issue in *Ortiz* frequently occurred at night. 422 U. S., at 894.

These fears are not, as the Court would have it, solely the lot of the guilty. See *ante*, at 452. To be law abiding is not necessarily to be spotless, and even the most virtuous can be unlucky. Unwanted attention from the local police need not be less discomforting simply because one's secrets are not the stuff of criminal prosecutions. Moreover, those who have found—by reason of prejudice or misfortune—that encounters with the police may become adversarial or unpleasant without good cause will have grounds for worrying at any stop designed to elicit signs of suspicious behavior. Being stopped by the police is distressing even when it should not be terrifying, and what begins mildly may by happenstance turn severe.

For all these reasons, I do not believe that this case is analogous to *Martinez-Fuerte*. In my opinion, the sobriety checkpoints are instead similar to—and in some respects more intrusive than—the random investigative stops that the Court held unconstitutional in *Brignoni-Ponce* and *Prouse*. In the latter case the Court explained:

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[6] See, *e. g.*, 1 Record 107.

> "We cannot agree that stopping or detaining a vehicle on an ordinary city street is less intrusive than a roving-patrol stop on a major highway and that it bears greater resemblance to a permissible stop and secondary detention at a checkpoint near the border. In this regard, we note that *Brignoni-Ponce* was not limited to roving-patrol stops on limited-access roads, but applied to any roving-patrol stop by Border Patrol agents on any type of roadway on less than reasonable suspicion. See 422 U. S., at 882–883; *United States* v. *Ortiz*, 422 U. S. 891, 894 (1975). We cannot assume that the physical and psychological intrusion visited upon the occupants of a vehicle by a random stop to check documents is of any less moment than that occasioned by a stop by border agents on roving patrol. Both of these stops generally entail law enforcement officers signaling a moving automobile to pull over to the side of the roadway, by means of a possibly unsettling show of authority. Both interfere with freedom of movement, are inconvenient, and consume time. Both may create substantial anxiety." 440 U. S., at 657.

We accordingly held that the State must produce evidence comparing the challenged seizure to other means of law enforcement, so as to show that the seizure

> "is a sufficiently productive mechanism to justify the intrusion upon Fourth Amendment interests which such stops entail. On the record before us, that question must be answered in the negative. Given the alternative mechanisms available, both those in use and those that might be adopted, we are unconvinced that the incremental contribution to highway safety of the random spot check justifies the practice under the Fourth Amendment." *Id.*, at 659.

II

The Court, unable to draw any persuasive analogy to *Martinez-Fuerte*, rests its decision today on application of a more general balancing test taken from *Brown* v. *Texas*, 443 U. S. 47 (1979). In that case the appellant, a pedestrian, had been stopped for questioning in an area of El Paso, Texas, that had "a high incidence of drug traffic" because he "looked suspicious." *Id.*, at 49. He was then arrested and convicted for refusing to identify himself to police officers. We set aside his conviction because the officers stopped him when they lacked any reasonable suspicion that he was engaged in criminal activity. In our opinion, we stated:

> "Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Id.*, at 50–51.

The gravity of the public concern with highway safety that is implicated by this case is, of course, undisputed.[7]

[7] It is, however, inappropriate for the Court to exaggerate that concern by relying on an outdated statistic from a tertiary source. The Court's quotation from the 1987 edition of Professor LaFave's treatise, *ante*, at 451, is in turn drawn from a 1983 law review note which quotes a 1982 House Committee Report that does not give the source for its figures. See 4 W. LaFave, Search and Seizure § 10.8(d), p. 71 (2d ed. 1987), citing Note, Curbing the Drunk Driver under the Fourth Amendment: The Constitutionality of Roadblock Seizures, 71 Geo. L. J. 1457, 1457, n. 1 (1983), citing, H. R. Rep. No. 97–867, p. 7.

JUSTICE BLACKMUN's citation, *ante*, at 455–456 (opinion concurring in judgment) to his own opinion in *Perez* v. *Campbell*, 402 U. S. 637, 657 (1971) (opinion concurring in part and dissenting in part) is even wider of the mark, since that case had nothing to do with drunken driving and the number of highway fatalities has since declined significantly despite the increase in highway usage.

By looking instead at recent data from the National Highway Traffic Safety Administration, one finds that in 1988 there were 18,501 traffic fatalities involving legally intoxicated persons and an additional 4,850 traffic fatalities involving persons with some alcohol exposure. Of course, the

Yet, that same grave concern was implicated in *Delaware* v. *Prouse*. Moreover, I do not understand the Court to have placed any lesser value on the importance of the drug problem implicated in *Brown* v. *Texas* or on the need to control the illegal border crossings that were at stake in *Almeida-Sanchez* and its progeny.[8] A different result in this case must be justified by the other two factors in the *Brown* formulation.

As I have already explained, I believe the Court is quite wrong in blithely asserting that a sobriety checkpoint is no more intrusive than a permanent checkpoint. In my opinion, unannounced investigatory seizures are, particularly when

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latter category of persons could not be arrested at a sobriety checkpoint, but even the total number of alcohol-related traffic fatalities (23,351) is significantly below the figure located by the student commentator and embraced by today's Court. These numbers, of course, include any accidents that might have been caused by a sober driver but involved an intoxicated person. They also include accidents in which legally intoxicated pedestrians and bicyclists were killed; such accidents account for 2,180 of the 18,501 total accidents involving legally intoxicated persons. The checkpoints would presumably do nothing to intercept tipsy pedestrians or cyclists. See Fatal Accident Reporting System 1988 Overview, p. 1; *id.*, Ch. 2, p. 5; see also 1 Record 58.

[8] The dissents in those cases touted the relevant state interests in detail. In *Almeida-Sanchez* v. *United States*, 413 U. S. 266, 293 (1973), JUSTICE WHITE, joined by the author of today's majority opinion, wrote:

"The fact is that illegal crossings at other than the legal ports of entry are numerous and recurring. If there is to be any hope of intercepting illegal entrants and of maintaining any kind of credible deterrent, it is essential that permanent or temporary checkpoints be maintained away from the borders, and roving patrols be conducted to discover and intercept illegal entrants as they filter to the established roads and highways and attempt to move away from the border area. It is for this purpose that the Border Patrol maintained the roving patrol involved in this case and conducted random, spot checks of automobiles and other vehicular traffic."

Then-JUSTICE REHNQUIST argued in a similar vein in his dissent in *Delaware* v. *Prouse*, in which he observed that:

"The whole point of enforcing motor vehicle safety regulations is to remove from the road the unlicensed driver before he demonstrates why he is unlicensed." 440 U. S., at 666.

they take place at night, the hallmark of regimes far different from ours;[9] the surprise intrusion upon individual liberty is not minimal. On that issue, my difference with the Court may amount to nothing less than a difference in our respective evaluations of the importance of individual liberty, a serious, albeit inevitable, source of constitutional disagreement.[10] On the degree to which the sobriety checkpoint seizures advance the public interest, however, the Court's position is wholly indefensible.

The Court's analysis of this issue resembles a business decision that measures profits by counting gross receipts and ignoring expenses. The evidence in this case indicates that sobriety checkpoints result in the arrest of a fraction of one percent of the drivers who are stopped,[11] but there is absolutely no evidence that this figure represents an increase over the number of arrests that would have been made by using the same law enforcement resources in conventional patrols.[12] Thus, although the *gross* number of arrests is more

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[9] "It is well to recall the words of Mr. Justice Jackson, soon after his return from the Nuremberg Trials:

"'These [Fourth Amendment rights], I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.' *Brinegar* v. *United States*, 338 U. S. 160, 180 [(1949)] (Jackson, J., dissenting)." *Almeida-Sanchez* v. *United States*, 413 U. S., at 273–274.

[10] See, *e. g.*, *Walters* v. *National Assn. of Radiation Survivors*, 473 U. S. 305, 371–372 (1985) (dissenting opinion); *Hudson* v. *Palmer*, 468 U. S. 517, 556–558 (1984) (dissenting opinion); *Meachum* v. *Fano*, 427 U. S. 215, 229–230 (1976) (dissenting opinion).

[11] The Court refers to an expert's testimony that the arrest rate is "around 1 percent," *ante*, at 455, but a fair reading of the entire testimony of that witness, together with the other statistical evidence in the record, points to a significantly lower percentage.

[12] Indeed, a single officer in a patrol car parked at the same place as the sobriety checkpoint would no doubt have been able to make some of the arrests based on the officer's observation of the way the intoxicated driver was operating his vehicle.

than zero, there is a complete failure of proof on the question whether the wholesale seizures have produced any *net* advance in the public interest in arresting intoxicated drivers.

Indeed, the position adopted today by the Court is not one endorsed by any of the law enforcement authorities to whom the Court purports to defer, see *ante*, at 453–454. The Michigan police do not rely, as the Court does, *ante*, at 454–455, on the *arrest rate* at sobriety checkpoints to justify the stops made there. Colonel Hough, the commander of the Michigan State Police and a leading proponent of the checkpoints, admitted at trial that the arrest rate at the checkpoints was "very low." 1 Record 87. Instead, Colonel Hough and the State have maintained that the mere *threat* of such arrests is sufficient to deter drunken driving and so to reduce the accident rate.[13] The Maryland police officer who testified

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[13] Colonel Hough's testimony included the following exchanges:

"Q. It is true, is it not, Colonel that your purpose in effectuating or attempting to effectuate this Checkpoint Plan is not to obtain large numbers of arrest of drunk drivers?

"A. That is correct.

"Q. Is it correct, is it, as far as you are aware, other states that have tried this have not found they are getting a high rate of arrests?

"A. Yes, that's my understanding.

"Q. What was your purpose then, Colonel, in attempting to implement this plan if you don't intend to use it to get drunk drivers arrested?

"A. Deter them from drinking and driving." App. 77a.

"Q. To your knowledge, in the Maryland study, the part you reviewed, the check lanes are not an effective tool for arresting drunk drivers?

"A. They have not relied upon the number of arrests to judge the successfulness in my understanding." *Id.*, at 82a.

"Q. Are you aware that within the announcements that went out to the public was an indication that the checkpoints were to effectuate or *[sic]* arrest of drunk drivers. There was a goal to effectuate arrests of drunk drivers?

"A. Well, it is part of the role, sure.

"Q. Certainly not your primary goal, is it?

"A. The primary goal is to reduce alcohol related accidents.

"Q. It's not your primary goal by any stretch, is it, to effectuate a high rate of arrests within this program?

at trial took the same position with respect to his State's program.[14] There is, obviously, nothing wrong with a law enforcement technique that reduces crime by pure deterrence without punishing anybody; on the contrary, such an approach is highly commendable. One cannot, however, prove its efficacy by counting the arrests that were made. One must instead measure the number of crimes that were avoided. Perhaps because the record is wanting, the Court simply ignores this point.

The Court's sparse analysis of this issue differs markedly from Justice Powell's opinion for the Court in *Martinez-Fuerte*. He did not merely count the 17,000 arrests made at the San Clemente checkpoint in 1973, 428 U. S., at 554; he also carefully explained why those arrests represented a net benefit to the law enforcement interest at stake.[15] Common

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"A. No.

"Q. If your goal was to effectuate a rise of arrests, you would use a different technique, wouldn't you?

"A. I don't know that." 1 Record 88–89.

Respondents informed this Court that at trial "the Defendants did not even attempt to justify sobriety roadblocks on the basis of the number of arrests obtained." Brief for Respondents 25. In answer, the State said: "Deterrence and public information are the primary goals of the sobriety checkpoint program, but the program is also clearly designed to apprehend any drunk drivers who pass through the checkpoint." Reply Brief for Petitioner 34. This claim, however, does not directly controvert respondents' argument or Colonel Hough's concession: Even if the checkpoint is designed to produce some arrests, it does not follow that it has been adopted in order to produce arrests, or that it can be justified on such grounds.

[14] "Dr. Ross' testimony regarding the low actual arrest rate of checkpoint programs was corroborated by the testimony of one of defendants' witnesses, Lieutenant Raymond Cotten of the Maryland State Police." 170 Mich. App., at 442, 429 N. W. 2d, at 184.

[15] "Our previous cases have recognized that maintenance of a traffic-checking program in the interior is necessary because the flow of illegal aliens cannot be controlled effectively at the border. We note here only the substantiality of the public interest in the practice of routine stops for inquiry at permanent checkpoints, a practice which the Government identi-

sense, moreover, suggests that immigration checkpoints are more necessary than sobriety checkpoints: There is no reason why smuggling illegal aliens should impair a motorist's driving ability, but if intoxication did not noticeably affect driving ability it would not be unlawful. Drunken driving, unlike smuggling, may thus be detected absent any checkpoints. A program that produces thousands of otherwise impossible arrests is not a relevant precedent for a program that produces only a handful of arrests which would be more easily obtained without resort to suspicionless seizures of hundreds of innocent citizens.[16]

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fies as the most important of the traffic-checking operations. Brief for United States in No. 74–1560, pp. 19–20. These checkpoints are located on important highways; in their absence such highways would offer illegal aliens a quick and safe route into the interior. Routine checkpoint inquiries apprehend many smugglers and illegal aliens who succumb to the lure of such highways. And the prospect of such inquiries forces others onto less efficient roads that are less heavily traveled, slowing their movement and making them more vulnerable to detection by roving patrols. Cf. *United States* v. *Brignoni-Ponce*, 422 U. S., at 883–885.

"A requirement that stops on major routes inland always be based on reasonable suspicion would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens. In particular, such a requirement would largely eliminate any deterrent to the conduct of well-disguised smuggling operations, even though smugglers are known to use these highways regularly." 428 U. S., at 556–557 (footnote omitted).

[16] Alcohol-related traffic fatalities are also susceptible to reduction by public information campaigns in a way that crimes such as, for example, smuggling or armed assault are not. An intoxicated driver is her own most likely victim: More than 55 percent of those killed in accidents involving legally intoxicated drivers are legally intoxicated drivers themselves. Fatal Accident Reporting System 1988 Overview, p. 1. Cf. *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 634 (STEVENS, J., concurring in part and concurring in judgment) ("[I]f they are conscious of the possibilities that such an accident might occur and that alcohol or drug use might be a contributing factor, if the risk of serious personal injury does not deter their use of these substances, it seems highly unlikely that the

III

The most disturbing aspect of the Court's decision today is that it appears to give no weight to the citizen's interest in freedom from suspicionless unannounced investigatory seizures. Although the author of the opinion does not reiterate his description of that interest as "diaphanous," see *Delaware* v. *Prouse*, 440 U. S., at 666 (REHNQUIST, J., dissenting), the Court's opinion implicitly adopts that characterization. On the other hand, the Court places a heavy thumb on the law enforcement interest by looking only at gross receipts instead of net benefits. Perhaps this tampering with the scales of justice can be explained by the Court's obvious concern about the slaughter on our highways and a resultant tolerance for policies designed to alleviate the problem by "setting an example" of a few motorists. This possibility prompts two observations.

First, my objections to random seizures or temporary checkpoints do not apply to a host of other investigatory procedures that do not depend upon surprise and are unquestionably permissible. These procedures have been used to address other threats to human life no less pressing than the threat posed by drunken drivers. It is, for example, common practice to require every prospective airline passenger, or every visitor to a public building, to pass through a metal detector that will reveal the presence of a firearm or an explosive. Permanent, nondiscretionary checkpoints could be used to control serious dangers at other publicly operated facilities. Because concealed weapons obviously represent one such substantial threat to public safety,[17] I would suppose

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additional threat of loss of employment would have any effect on their behavior").

[17] For example, in 1988 there were 18,501 traffic fatalities involving legally intoxicated persons. If one subtracts from this number the 10,210 legally intoxicated drivers who were *themselves* killed in these crashes, there remain 8,291 fatalities in which somebody other than the intoxicated driver was killed in an accident involving legally intoxicated persons (this

that all subway passengers could be required to pass through metal detectors, so long as the detectors were permanent and every passenger was subjected to the same search.[18] Likewise, I would suppose that a State could condition access to its toll roads upon not only paying the toll but also taking a uniformly administered breathalyzer test. That requirement might well keep all drunken drivers off the highways that serve the fastest and most dangerous traffic. This procedure would not be subject to the constitutional objections that control this case: The checkpoints would be permanently fixed, the stopping procedure would apply to all users of the toll road in precisely the same way, and police officers would not be free to make arbitrary choices about which neighborhoods should be targeted or about which individuals should be more thoroughly searched. Random, suspicionless seizures designed to search for evidence of firearms, drugs, or intoxication belong, however, in a fundamentally different category. These seizures play upon the detained individual's reasonable expectations of privacy, injecting a suspicionless search into a context where none would normally occur. The imposition that seems diaphanous today may be intolerable tomorrow. See *Boyd* v. *United States*, 116 U. S. 616, 635 (1886).

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number still includes, however, accidents in which legally intoxicated pedestrians stepped in front of sober drivers and were killed). Fatal Accident Reporting System 1988 Overview, p. 1; see also n. 15, *supra*.

By contrast, in 1986 there were a total of 19,257 murders and nonnegligent manslaughters. Of these, approximately 11,360 were committed with a firearm, and another 3,850 were committed with some sort of knife. U. S. Dept. of Justice, 1987 Sourcebook of Criminal Justice Statistics 337 (1988).

From these statistics, it would seem to follow that someone who does not herself drive when legally intoxicated is more likely to be killed by an armed assailant than by an intoxicated driver. The threat to life from concealed weapons thus appears comparable to the threat from drunken driving.

[18] Permanent, nondiscretionary checkpoints are already a common practice at public libraries, which now often require every patron to submit to a brief search for books, or to leave by passing through a special detector.

Second, sobriety checkpoints are elaborate, and disquieting, publicity stunts. The possibility that anybody, no matter how innocent, may be stopped for police inspection is nothing if not attention getting. The shock value of the checkpoint program may be its most effective feature: Lieutenant Cotten of the Maryland State Police, a defense witness, testified that "the media coverage . . . has been absolutely overwhelming . . . . Quite frankly we got benefits just from the controversy of the sobriety checkpoints."[19] In-

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[19] 2 Record 40. Colonel Hough and Lieutenant Cotten agreed that publicity from the news media was an integral part of the checkpoint program. Colonel Hough, for example, testified as follows:

"Q. And you have observed, haven't you, Colonel, any time you have a media campaign with regard to a crackdown you're implementing, it does have a positive effect?

"A. We believe it has an effect, yes.

"Q. And in order for the positive effect of the media campaign to continue would be necessary to continue the announcements that you are putting out there?

"A. Yes.

"Q. It's true, isn't it, much of the media publicity attendant to this sobriety checkpoint has come from your public service announcements about the general media attention to this issue and placing it in our newspapers as a public interest story?

"A. Yes. . . .

"Q. Or other television public interest stories?

"A. Yes.

"Q. You don't anticipate, do you, Colonel, that the level of media interest in this matter will continue over the long haul, do you?

"A. I am certain it will wane in a period of time.

"Q. Have you ever given any thought to whether or not a different type of deterrent program with the same type of attendant media attention would have a similar deterrent effect as to what you can expect at the checkpoint?

"A. We have done it both with a SAVE Program and CARE Program and selective enforcement. Probably it has not received as great of attention as this has.

"Q. Any question, have you ever given any thought to whether or not a different technique with the same attendant media publicity that this has gotten would have the same effect you're looking for here?

sofar as the State seeks to justify its use of sobriety checkpoints on the basis that they dramatize the public interest in the prevention of alcohol-related accidents, the Court should heed JUSTICE SCALIA's comment upon a similar justification for a drug screening program:

> "The only plausible explanation, in my view, is what the Commissioner himself offered in the concluding sentence of his memorandum to Customs Service employees announcing the program: 'Implementation of the drug screening program would set an important example in our country's struggle with this most serious threat to our national health and security.' App. 12. Or as respondent's brief to this Court asserted: 'if a law enforcement agency and its employees do not take the law seriously, neither will the public on which the agency's effectiveness depends.' Brief for Respondent 36. What better way to show that the Government is serious about its 'war on drugs' than to subject its employees on the front line of that war to this invasion of their privacy and affront to their dignity? To be sure, there is only a slight chance that it will prevent some serious public harm resulting from Service employee drug use, but it will show to the world that the Service is 'clean,' and—most important of all—will demonstrate the determination of the Government to eliminate this scourge of our society! I think it obvious that this justification is unacceptable; that the impairment of individual liberties cannot be the means of making a point; that symbolism,

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"A. No." 1 *id.*, at 91–92.

In addition, Point 6 of the Michigan State Police Sobriety Checkpoint Guidelines indicates that each driver stopped should be given a brochure describing the checkpoint's purposes and operation. "The brochure will explain the purpose of the sobriety checkpoint program, furnish information concerning the effects of alcohol and safe consumption levels, and include a detachable pre-addressed questionnaire." Trial Exhibit A, Michigan State Police Sobriety Checkpoint Guidelines 8 (Feb. 1986). The Maryland program had a similar feature. 2 Record 18.

> even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search." *Treasury Employees* v. *Von Raab*, 489 U. S. 656, 686–687 (1989) (dissenting opinion).

This is a case that is driven by nothing more than symbolic state action—an insufficient justification for an otherwise unreasonable program of random seizures. Unfortunately, the Court is transfixed by the wrong symbol—the illusory prospect of punishing countless intoxicated motorists—when it should keep its eyes on the road plainly marked by the Constitution.

I respectfully dissent.

SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* STROOP ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 89–535. Argued March 26, 1990—Decided June 14, 1990

In determining whether a family's income disqualifies it from receiving benefits under the Aid to Families With Dependent Children (AFDC) program of Part A of Title IV of the Social Security Act, the appropriate agency of a participating State is required to "disregard the first $50 of any child support payments" received by the family in any month for which benefits are sought. 42 U. S. C. § 602(a)(8)(A)(vi). Under this provision, petitioner Secretary of Health and Human Services has declined to "disregard" the first $50 of "child's insurance benefits" received under Title II of the Act, reasoning that such benefits are not "child support" because that term, as used throughout Title IV, invariably refers to payments from absent parents. The District Court granted summary judgment for respondents, custodial parents receiving AFDC benefits, in their suit challenging the Secretary's interpretation of § 602(a)(8)(A)(vi). The Court of Appeals affirmed, reasoning that, since AFDC applicants receiving Title II benefits are burdened by the same eligibility constraints as those receiving payments directly from absent parents, no rational basis exists for according one class of families the mitigating benefit of the disregard while depriving the other of that benefit. The court added that to construe § 602(a)(8)(A)(vi) to exclude the Title II benefits from the disregard would raise constitutional equal protection concerns.

Held: Title II "child's insurance benefits" do not constitute "child support" within the meaning of § 602(a)(8)(A)(vi). The clear and unambiguous language of the statute demonstrates that Congress used "child support" throughout Title IV as a term of art referring exclusively to payments from absent parents. See, *e. g.*, § 651, the first provision in Part D of Title IV, which is devoted exclusively to "Child Support and Enforcement of Paternity." Since the statute also makes plain that Congress meant for the Part D program to work in tandem with the Part A AFDC program to provide uniform levels of support for children of equal need, see §§ 602(a)(26), 602(a)(27), 654(5), the phrase "child support" as used in the two Parts must be given the same meaning. See, *e. g.*, *Sorenson* v. *Secretary of Treasury*, 475 U. S. 851, 860. Thus, although governmentally funded Title II child's insurance benefits might be characterized as

"support" in the generic sense, they are not the sort of child support payments from absent parents envisioned by Title IV. This is the sort of statutory distinction that does not violate the Equal Protection Clause "if any state of facts reasonably may be conceived to justify it," *Bowen* v. *Gilliard*, 483 U. S. 587, 601, and it is justified by Congress' intent to encourage the making of child support payments by absent parents. Pp. 481–485.

870 F. 2d 969, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 485. STEVENS, J., filed a dissenting opinion, *post*, p. 496.

Clifford M. Sloan argued the cause for petitioner. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Gerson*, *Deputy Solicitor General Merrill*, and *Robert D. Kamenshine*. *Mary Sue Terry*, Attorney General of Virginia, *R. Claire Guthrie*, Deputy Attorney General, *John A. Rupp*, Senior Assistant Attorney General, and *Thomas J. Czelusta*, Assistant Attorney General, filed a brief for Larry D. Jackson as respondent under this Court's Rule 12.4, in support of petitioner.

Jamie B. Aliperti argued the cause for respondents. With her on the brief for respondents Elizabeth Stroop et al. was *Claire E. Curry*.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In this case we review a determination by petitioner, the Secretary of Health and Human Services, that "child's insurance benefits" paid pursuant to Title II of the Social Security Act, see 49 Stat. 623, as amended, 42 U. S. C § 402(d) (1982 ed. and Supp. V), do not constitute "child support" as that term is used in a provision in Title IV of the Act governing eligibility for Aid to Families With Dependent Children (AFDC). See 42 U. S. C. § 602(a)(8)(A)(vi) (1982 ed., Supp. V). We uphold the Secretary's determination and reverse

the contrary holding of the United States Court of Appeals for the Fourth Circuit.

Title IV requires the applicable agencies of States participating in the AFDC program to consider "other income and resources of any child or relative claiming" AFDC benefits "in determining need" for benefits. § 602(a)(7)(A). The state agencies "shall determine ineligible for aid any family the combined value of whose resources . . . exceeds" the level specified in the Act. § 602(a)(7)(B). Central to this case is one of the amendments to Title IV in the Deficit Reduction Act of 1984 (DEFRA), Pub. L. 98–369, § 2640, 98 Stat. 1145–1146, affecting eligibility for AFDC benefits. This amendment provides:

> ". . . [W]ith respect to any month, in making the determination under [§ 602(a)(7)], the State agency—
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> . . . . .
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> "*shall disregard the first $50 of any child support payments* received in such month with respect to the dependent child or children in any family applying for or receiving aid to families with dependent children (including support payments collected and paid to the family under section 657(b) of this title). . . ." 42 U. S. C. § 602(a)(8)(A)(vi) (1982 ed., Supp. V) (emphasis added).

The Secretary has declined to "disregard" under this provision the first $50 of Title II Social Security child's insurance benefits paid on behalf of children who are members of families applying for AFDC benefits. In the Secretary's view, the Government-funded child's insurance benefits are not "child support" for purposes of § 602(a)(8)(A)(vi) because that term, as used throughout Title IV, "invariably refers to payments from absent parents." Brief for Petitioner 13.

Respondents are custodial parents receiving AFDC benefits who are aggrieved by the implementation of the DEFRA amendments. They sued in the United States District Court for the Eastern District of Virginia challenging petitioner's interpretation of the disregard on statutory and constitu-

tional grounds. See Complaint, App. 31–33. The District Court granted summary judgment for respondents on the basis of their statutory challenge and thereby avoided reaching the constitutional challenge. App. to Pet. for Cert. 22a.

The United States Court of Appeals for the Fourth Circuit affirmed the District Court. *Stroop* v. *Bowen*, 870 F. 2d 969, 975 (1989). According to the Court of Appeals, Congress nowhere explicated its use of the term "child support" in § 602(a)(8)(A)(vi) and the only known discussion of the purpose of the disregard provision is in our decision in *Bowen* v. *Gilliard*, 483 U. S. 587 (1987). As read by the Court of Appeals, *Bowen* noted that "the disregard of the first $50 paid by a father serves to mitigate the burden of the changes wrought by the DEFRA amendments." 870 F. 2d, at 974 (citing 483 U. S., at 594). The court reasoned that although we had not considered the question of Title II child's insurance payments in *Bowen*, the disregarding of the first $50 of such payments, "received in lieu of payments made by a father," would serve the same purpose of mitigating the harshness of the DEFRA amendments. 870 F. 2d, at 974. Since AFDC applicants receiving Title II child's insurance benefits are burdened by the DEFRA amendments no less than applicants receiving payments directly from noncustodial parents, no rational basis exists for according one class of families the mitigating benefit of the disregard while depriving another indistinguishable class of families of the same benefit. The court thus rejected the Secretary's interpretation of the disregard and added that to construe § 602(a)(8)(A)(vi) to exclude the Title II benefits from the disregard would raise constitutional equal protection concerns. *Id.*, at 975. We granted certiorari, 493 U. S. 1018 (1990), to resolve the conflict between the decision of the Fourth Circuit and the contrary holding of the Court of Appeals for the Eighth Circuit in *Todd* v. *Norman*, 840 F. 2d 608 (1988).

We think the Secretary's construction is amply supported by the text of the statute which shows that Congress used

"child support" throughout Title IV of the Social Security Act and its amendments as a term of art referring exclusively to payments from absent parents. This being the case, we need go no further:

> "'If the statute is clear and unambiguous "that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." . . . In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.'" *K mart Corp.* v. *Cartier, Inc.*, 486 U. S. 281, 291–292 (1988) (internal citations omitted).

As an initial matter, the common usage of "child support" refers to legally compulsory payments made by parents. Black's Law Dictionary 217 (5th ed. 1979) defines "child support" as

> "[t]he legal obligation of parents to contribute to the economic maintenance, including education, of their children; enforceable in both civil and criminal contexts. In a dissolution or custody action, money paid by one parent to another toward the expenses of children of the marriage."

Attorneys who have practiced in the area of domestic relations law will immediately recognize this definition. Respondents insist, however, that we have traditionally "turned to authorities of general reference, not to legal dictionaries, to [give] 'ordinary meaning to ordinary words.'" Brief for Respondents 20 (citing *Sullivan* v. *Everhart*, 494 U. S. 83, 91–92 (1990)). But the general reference work upon which respondents principally rely defines "child support" as "money paid for the care of *one's* minor child, *esp[ecially] payments to a divorced spouse or a guardian under a decree of divorce.*" Random House Dictionary of the English Language 358 (2d ed. 1987) (emphasis added) (cited at Brief for Respondents 20). Respondents also seek to bolster their view

with definitions of the word "support" from other dictionaries. *Ibid.* But where a phrase in a statute appears to have become a term of art, as is the case with "child support" in Title IV, any attempt to break down the term into its constituent words is not apt to illuminate its meaning.

Congress' use of "child support" throughout Title IV shows no intent to depart from common usage. As previously noted, the provisions governing eligibility for AFDC benefits, including the "disregard" provision in issue here, are contained in Title IV of the Social Security Act. 42 U. S. C. §§ 601–679a (1982 ed. and Supp. V). Title IV, as its heading discloses, establishes a unified program of grants "For Aid and Services to Needy Families With Children and For Child-Welfare Services" to be implemented through cooperative efforts of the States and the Federal Government. Part D of Title IV is devoted exclusively to "Child Support and Establishment of Paternity." See §§ 651–667. The first provision in Part D authorizes appropriations

> "[f]or the purpose of enforcing the *support obligations owed by absent parents* to their children and the spouse (or former spouse) with whom such children are living, [and] locating *absent parents* . . . ." 42 U. S.C. § 651 (1982 ed., Supp. V) (emphasis added).

The remainder of Part D, 42 U. S. C. §§ 652–667 (1982 ed. and Supp. V), abounds with references to "child support" in the context of compulsory support funds from absent parents. See, *e. g.*, §§ 652(a)(1), 652(a)(7), 652(a)(10)(B), 652(a)(10)(C), 652(b), 653(c)(1), 654, 654(6), 654(19)(A), 654(19)(B), 656(b), 657(a), 659(a), 659(b), 659(d), 661(b)(3), 662(b). Section 653, indeed, creates an absent parent "Locator Service."

The statute also makes plain that Congress meant for the Part D Child Support program to work in tandem with the AFDC program which constitutes Part A of Title IV, §§ 601–615. Section 602(a)(27) requires state plans for AFDC participation to "provide that the State has in effect a

plan approved under part D . . . and operates a child support program in substantial compliance with such plan." Section 602(a)(26) requires State AFDC plans to

> "provide that, as a condition of eligibility for [AFDC benefits], each applicant or recipient will be required—
>
> "(A) to assign the State any rights to support from any other person such applicant may have (i) in his own behalf or in behalf of any other family member for whom the applicant is applying for or receiving aid, . . . [and]
>
> "(B) to cooperate with the State . . . (ii) in obtaining support payments for such applicant and for a child with respect to whom such aid is claimed . . . ."

Part D, in turn, requires state plans implementing Title IV Child Support programs to

> "provide that (A) in any case in which support payments are collected for an individual with respect to whom an assignment under section 602(a)(26) [in Part A] of this title is effective, such payments shall be made to the State for distribution pursuant to section 657 [in Part D] of this title . . . ." § 654(5).

These cross-references illustrate Congress' intent that the AFDC and Child Support programs operate together closely to provide uniform levels of support for children of equal need. That intent leads to the further conclusion that Congress used the term "child support" in § 602(a)(8)(A)(vi), and in Part A generally, in the limited sense given the term by its repeated use in Part D. The substantial relation between the two programs presents a classic case for application of the "normal rule of statutory construction that '"identical words used in different parts of the same act are intended to have the same meaning."'" *Sorenson* v. *Secretary of Treasury*, 475 U. S. 851, 860 (1986) (quoting *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, 87 (1934) (in turn quoting *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427, 433 (1932))).

Since the Secretary's interpretation of the § 602(a)(8)(A)(vi) disregard incorporates the definition of "child support" that we find plain on the face of the statute, our statutory inquiry is at an end. The disregard, accordingly, does not admit of the interpretation advanced by respondents and accepted by both courts below. Though Title II child's insurance benefits might be characterized as "support" in the generic sense, they are not the sort of child support payments from absent parents envisioned in the Title IV scheme. The Title II payments are explicitly characterized in § 402(d) as "insurance" benefits and are paid out of the public treasury to all applicants meeting the statutory criteria. Thus no portion of any § 402(d) payments may be disregarded under § 602(a)(8)(A)(vi).

The Court of Appeals construed the statute the way it did in part because it felt the construction we adopt would raise a serious doubt as to its constitutionality. App. to Pet. for Cert. 12a. We do not share that doubt. We agree with the Secretary that Congress' desire to encourage the making of child support payments by absent parents, see, *e. g.*, 42 U. S. C. §§ 602(a)(26)(B)(ii) and 654(5) (1982 ed., Supp. V) (requiring AFDC recipients to assist in the collection of child support payments for distribution by the States under Part D)), affords a rational basis for applying the disregard to payments from absent parents, but not to Title II insurance payments which are funded by the Government. This sort of statutory distinction does not violate the Equal Protection Clause "if any state of facts reasonably may be conceived to justify it." *Bowen* v. *Gilliard*, 483 U. S., at 601.

The judgment of the Court of Appeals is therefore

Reversed.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

Today the Court holds that the plain language of a statute applicable by its terms to "any child support payments" com-

pels the conclusion that the statute does not apply to benefits paid to the dependent child of a disabled, retired, or deceased parent for the express purpose of supporting that child. Because I am persuaded that this crabbed interpretation of the statute is neither compelled by its language nor consistent with its purpose, and arbitrarily deprives certain families of a modest but urgently needed welfare benefit, I dissent.

I

I begin, as does the majority, with the plain language of the disregard provision. It refers to "*any child support payments* received . . . with respect to the dependent child or children in any family applying for or receiving aid to families with dependent children (*including* support payments collected and paid to the family under section 657(b) of this title)."[1] 42 U. S. C. § 602(a)(8)(A)(vi) (1982 ed., Supp. V) (emphasis added). This language does not support the majority's narrow interpretation. The word "any" generally means all forms or types of the thing mentioned. When coupled with the parenthetical phrase "including . . . ," it indicates that "support payments collected and paid" by the State constitute one type within the larger universe of "child support payments." As the majority recognizes, § 602(a)(26)(A) requires all applicants for AFDC to "assign the State any rights to support from any other person . . . ." Thus, support payments from absent parents will almost always fall within the parenthetical clause referring to "support payments collected and paid" by the State. The plain words of the disregard provision indicate that such payments are only one of various types of child support payments; limiting the meaning of child support to an absent

[1] Title 42 U. S. C. § 657(b) (1982 ed., Supp. V) provides that, when a state agency collects child or spousal support payments on behalf of a family receiving Aid to Families With Dependent Children (AFDC), it shall pay to the family the first $50 of each month's payment and retain the rest to reimburse the Government for AFDC benefits.

parent's payments renders the statutory language "any child support payments . . . including . . ." meaningless.

The majority's insistence that the ordinary meaning of the term "child support" excludes Title II payments makes little sense. Title II is a program of mandatory wage deductions, designed to ensure that a worker's dependents will have some income, should the worker retire, die, or become disabled. *Califano* v. *Boles*, 443 U. S. 282, 283 (1979) (Title II "attempts to obviate, through a program of forced savings, the economic dislocations that may otherwise accompany old age, disability, or the death of a breadwinner"). Thus, the worker is *legally compelled* to set aside a portion of his wages in order to earn benefits used *to support his dependent children* in the event he becomes unable to do so himself. A child is entitled to Title II payments only if he or she lived with, or received financial support from, the insured worker—that is, only if the relationship between the child and the insured worker would (or did) give rise to a legally enforceable support obligation. 42 U. S. C. § 402(d) (1982 ed. and Supp. V). The sole and express purpose of Title II children's benefits is to support dependent children. *Jimenez* v. *Weinberger*, 417 U. S. 628, 634 (1974) ("[T]he primary purpose of the . . . Social Security scheme is to provide support for dependents of a disabled wage earner"); *Mathews* v. *Lucas*, 427 U. S. 495, 507 (1976) ("[T]he Secretary explains the design of the statutory scheme . . . as a program to provide for all children of deceased [or disabled] insureds who can demonstrate their 'need' in terms of dependency"); see also *Mathews* v. *De Castro*, 429 U. S. 181, 185–186, and n. 6 (1976). It is unlawful to use Title II payments for any other purpose. 42 U. S. C. § 408(e) (1982 ed.).[2]

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[2]The overwhelming majority of state courts that have passed on the question have concluded that a parent's court-ordered child support obligations may be fulfilled by Title II payments, recognizing the functional equivalence of the two types of payments. See, *e. g.*, *Stroop* v. *Bowen*,

How are Title II payments different from court-ordered payments by an absent parent? Their source is the same: a parent's wages or assets.[3] Their purpose is the same: to provide for the needs of a dependent child, in lieu of the support of a working parent living in the home. The majority does not even attempt to explain why the common usage and understanding of the term "child support" would include all the types of payments the Secretary says the disregard provision covers—legally compulsory payments from absent parents, voluntary payments,[4] and even spousal support payments[5]—but would exclude Title II payments.

Nonetheless, the majority insists that Title II payments do not constitute "child support." The majority points to the use of the term "child support" in Part D of Title IV to refer to court-ordered support payments by absent parents. This begs the question. Naturally, Congress was referring to compulsory support payments in Part D, because that part of the statute is concerned with "enforcing the support obligations owed by absent parents to their children." 42 U. S. C. § 651 (1982 ed., Supp. V). Other types of child support, such as payments voluntarily made by absent parents, or payments made by the Government on behalf of dead, disabled, or retired parents, do not involve the same problems of en-

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870 F. 2d 969, 974–975 (CA4 1989) (collecting cases); *Todd* v. *Norman*, 840 F. 2d 608, 614, and n. 4 (CA8 1988) (dissenting opinion).

[3] Although Title II payments are made by a Government agency, not directly by the parent, their ultimate source is the parent's earnings. See *Califano* v. *Boles*, 443 U. S. 282, 283 (1979). Moreover, not all court-ordered support payments are made by the parent; under a mandatory wage-assignment order, child support is deducted automatically from the absent parent's wages (just as Title II deductions are). See 42 U. S. C. § 666(b) (1982 ed., Supp. V).

[4] The Secretary considers voluntary payments by an absent parent to be "child support" within the meaning of the disregard provision. 53 Fed. Reg. 21644 (1988).

[5] See *id.*, at 21642.

forcement.[6] Nowhere in Part D did Congress actually define "child support," nor does Part D or any other provision of Title IV indicate that Congress thought the term "child support" referred *only* to compulsory payments or *only* to payments made directly by the absent parent.

The majority relies on the maxim of statutory construction that identical words in two related statutes, or in different parts of the same statute, are intended to have the same meaning. *Ante*, at 484. Like all such maxims, however, this is merely a general assumption, and is not always valid or applicable. In *Erlenbaugh* v. *United States*, 409 U. S. 239 (1972), for example, the Court declined to follow this maxim, because it was invoked not simply to resolve any ambiguities or doubts in the statutory language, but, as in this case, "to introduce an exception to the coverage of the [statute] where none is now apparent." *Id.*, at 245. The Court commented: "This might be a sensible construction of the two statutes if they were intended to serve the same function, but plainly they were not." *Ibid.* It went on to explain that the two statutes had different purposes, and the reason for the limited scope of one was absent in the context of the other. *Id.*, at 245–247. See also *District of Columbia* v. *Carter*, 409 U. S. 418, 421 (1973) ("At first glance, it might seem logical simply to assume . . . that identical words used in two related statutes were intended to have the same effect. Nevertheless . . . the meaning well may vary to meet the purposes of the law") (internal quotation marks omitted); *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, 87 (1934) ("[S]ince most words admit of different shades of meaning, susceptible of being expanded or abridged to con-

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[6] The majority's reliance on the fact that Part D "abounds with references to 'child support' in the context of compulsory support funds from absent parents," *ante*, at 483, to limit the meaning of "child support" in § 602(a)(8)(A)(vi) appears to be inconsistent with the Secretary's own interpretation of the disregard provision as including voluntary as well as court-ordered payments. See n. 4, *supra*.

form to the sense in which they are used, the presumption readily yields [when] the words, though in the same act, are found in . . . dissimilar connections"). This Court's articulation of the limits of the maxim in *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427 (1932), bears repeating, for it remains true today:

> "But the presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent . . . . [T]he meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed. . . .
>
> "It is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the legislature intended it should have in each instance." *Id.*, at 433.

I conclude that the plain language of the statute does not unequivocally support the Secretary's interpretation. It is equally consistent with the opposite conclusion that Title II payments fall within the broad, inclusive phrase "any child support payments." It is therefore proper to turn to the purpose and history of the disregard provision for aid in construing that provision.

II

The majority, in its conservatively restrictive approach, makes only passing reference to the hardship brought about by the DEFRA amendments. A closer look at the effect of these amendments is necessary to understand the function of the disregard provision. DEFRA changed the AFDC statutes in two ways relevant here. First, it established

the "mandatory filing unit" requirement that a family's application for AFDC benefits must take into account any income received by any member of the family, including all children living in the same household. 42 U. S. C. § 602(a)(38) (1982 ed., Supp. V). See *Bowen* v. *Gilliard*, 483 U. S. 587, 589 (1987).

Under prior law, parents could choose to exclude from their AFDC applications children who received income from other sources. This exclusion, in some circumstances, was advantageous to the family; although the family then would not receive AFDC funds for the excluded child, that child's income would not be considered in determining its overall AFDC eligibility. Thus, in situations where a child's separate income was greater than the incremental amount of AFDC benefits the family would receive for that child, the family was better off not counting the child in its AFDC application.

Along with the new requirement, however, Congress enacted the provision at issue here. The Court in *Gilliard* explained:

> "Because the 1984 amendments forced families to include in the filing unit children for whom support payments were being received, the practical effect was that many families' total income was reduced. The burden of the change was mitigated somewhat by a separate amendment providing that the first $50 of child support collected by the State must be remitted to the family and not counted as income for the purpose of determining its benefit level." *Id.*, at 594.[7]

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[7] The $50 disregard, though it may seem to be a small sum, may be a substantial part of a family's monthly income. In Virginia, respondents' State of residence, the maximum monthly AFDC payment for a family of three is currently $265. Brief for Respondents 1–2. See 45 CFR § 233.20(a)(2) (1989); Virginia Code § 63.1–110 (Supp. 1990). An additional $50 would be a 19% increase in AFDC benefits.

The legislative history of the DEFRA amendments supports the conclusion that the disregard provision was intended to mitigate the harsh effects of the amendments. The mandatory filing-unit provision was first proposed by the Secretary in 1982, but it was dropped in Conference because of opposition in the House. See H. R. Conf. Rep. No. 97–760, p. 446 (1982). In 1983, the Secretary again proposed this provision, and it was approved by the Senate. S. Rep. No. 98–300, p. 165 (1983). Again, there was opposition in the House, and consideration of the provision was carried over to the next session. House Committee on Ways and Means, Description of the Administration's Fiscal Year 1985 Budget, Comm. Print No. 98–24, pp. 25, 29–30 (1984). In 1984, the provision was added by the Senate amendments to H. R. 4170, the bill that became the Deficit Reduction Act of 1984 (DEFRA). The Report of the House-Senate Conference Committee explains:

> "The conference agreement follows the Senate amendment with the following modification: a monthly disregard of $50 of child support received by a family is established." H. R. Conf. Rep. No. 98–861, p. 1407 (1984).

Neither the House bill nor the Senate bill had contained a disregard provision prior to the Conference, nor is there any discussion in the legislative history of such a provision. The only plausible explanation for its sudden appearance is that it was meant to assuage the concerns of some Members of Congress about the harsh impact of the DEFRA amendments and thus to facilitate the passage of the mandatory filing-unit requirement.

The burden of the DEFRA amendments falls equally on families with children receiving Title II benefits and on those with children receiving court-ordered support payments. The mitigating purpose of the disregard provision therefore applies equally to both categories of families. The purpose and history of the disregard provision support the Court of Appeals' interpretation of that provision and resolve any

ambiguity as to the meaning of the statutory words "any child support payments."

Since the Secretary's interpretation of the disregard rule is not compelled by the language of the statute and is not supported by its purpose and legislative history, it is not entitled to deference and should be rejected by this Court. See *NLRB* v. *Food & Commercial Workers*, 484 U. S. 112, 123 (1987) ("On a pure question of statutory construction, our first job is to try to determine congressional intent, using 'traditional tools of statutory construction.' If we can do so, then that interpretation must be given effect, and the regulations at issue must be fully consistent with it"); *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843, n. 9 (1984) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent . . . . If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect").

III

Even if the meaning of "child support" in the disregard provision were ambiguous, however, the Secretary's interpretation should still be rejected because it is so arbitrary as not to reflect a "permissible construction of the statute." *Id.*, at 843. The Secretary's position is that the disregard applies to legally compulsory child support payments, voluntary child support payments, and spousal support payments by absent parents, but not to Title II payments. See nn. 4 and 5, *supra*.

Consider, for example, a family consisting of a mother and three children. One of the children is of a prior marriage and receives support from her absent father. The father voluntarily sets aside a portion of his wages every month and sends them to the mother for the child's support. The disregard

provision applies. See n. 4, *supra*. Then the father retires and stops his voluntary contributions, but the child now receives Title II benefits each month. The disregard provision, according to the Secretary, does not apply. But then the mother obtains a court order obligating the father to make child support payments each month, and he does so. The disregard provision applies. Then the father asks the court to amend the support order, so that the Title II benefits are used to satisfy his support obligation. See n. 2, *supra*. The disregard provision, according to the Secretary, does not apply.

Throughout this example, the child's and her family's financial needs remain the same. The impact of the mandatory filing-unit requirement, forcing the family to count the child's income in its AFDC application and thus reducing the level of its benefits, remains the same. The source of the child's income—her father's earnings—and the purpose of that income—to fulfill his duty to provide for the needs of his dependent child—remain the same. But the applicability of the disregard provision changes with the vagaries of the Secretary's regulations.

The Secretary argues that his interpretation of the disregard provision is rational because the disregard serves as an incentive for absent parents to make support payments and for custodial parents to cooperate in enforcement efforts (since $50 of those payments directly benefits the family and does not merely reimburse the State for AFDC). But there is simply no indication that Congress intended to limit the applicability of the disregard provision to situations in which it would serve as an incentive. There is no mention of such a purpose in the legislative history of the provision; moreover, the Secretary points to no discussion of the need for such an incentive anywhere in the legislative history of the DEFRA amendments.[8]

[8] The Secretary relies on the legislative history of a 1975 provision which allowed 40% of the first $50 of child support collected by the

Even if the disregard rule were intended to serve as an incentive, that does not justify applying the disregard to all court-ordered support payments, but not to Title II benefits. Not all court-ordered support payments depend on the voluntary compliance of the absent parent; some are deducted directly from the absent parent's wages—just like Title II deductions. See n. 3, *supra*. Also, insofar as the disregard serves as an incentive for the custodial parent to help collect support payments, that purpose applies to Title II benefits as well as to court-ordered support payments. To qualify for Title II benefits, the custodial parent, on behalf of the child, must complete an application and, if necessary, establish paternity. If the disregard does not apply to Title II benefits, so that they serve only to reduce a family's AFDC eligibility, the custodial parent has no financial incentive to apply for them.

Thus, I believe that the Secretary cannot provide any rational explanation for his view that the disregard provision does not apply to Title II payments. Even assuming that the provision is ambiguous and that *Chevron* deference is to

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state agency to be disregarded in determining the family's income level. 42 U. S. C. § 657(a)(1) (1982 ed.). This provision, by its express terms, however, is applicable only "during the 15 months beginning July 1, 1975." In 1975, the statutory obligation of AFDC applicants to assign support rights and cooperate with enforcement efforts had just been established, see 42 U. S. C. § 602(a)(26) (1982 ed., Supp. V), and Congress apparently believed that a temporary incentive provision would help to ensure compliance with these new requirements. Such a rule, however, was never again proposed or enacted between 1975 and 1984.

By 1984, the assignment and cooperation requirements were longstanding conditions of AFDC eligibility. Custodial parents who failed to assign their support rights and cooperate in enforcement efforts would know that they stood to lose their AFDC benefits. The very different contexts in which the 1974 and 1984 disregard statutes were enacted thus give an additional reason for this Court's usual reluctance to infer the intent of one Congress from the views expressed by another. See *Russello* v. *United States*, 464 U. S. 16, 26 (1983); *Oscar Mayer & Co.* v. *Evans*, 441 U. S. 750, 758 (1979).

be considered, I cannot in good conscience defer to an administrative interpretation that results in an arbitrary and irrational reduction of welfare benefits to certain needy families. I view with regret the Court's acquiescence in an administrative effort to cut the costs of the AFDC program by any means that are available.

I dissent.

JUSTICE STEVENS, dissenting.

Although the answer to the question presented by this case is not quite as clear to me as it is to JUSTICE BLACKMUN, I believe he has the better of the argument. If one puts aside legal terminology and considers ordinary English usage, Social Security benefits paid to the surviving child of a deceased wage earner are reasonably characterized as a form of "child support payments"—indeed, they are quite obviously payments made to support children. Moreover, respondents' interpretation of Title IV of the Social Security Act effectuates congressional intent: If a $50 portion of Social Security payments is disregarded when a family's eligibility for aid is determined, children with equal need will be more likely to receive equal aid. Finally, the interpretation achieves this parity in a way that serves the disregard provision's purpose—fairly inferred from legislative history—of mitigating the hardships imposed by the 1984 amendment that required families applying for aid to count child support payments as available income.

Thus, Title II children's benefit payments are fairly encompassed by both the language and the purpose of the disregard provision. It may be that Congress did not sharply focus on the specific problem presented by this case; the statutory terminology suggests as much. Yet, this fact does not seem to me sufficient reason for refusing to give effect to Congress' more general intent, an intent that is expressed, albeit imperfectly, in the language Congress chose. For these

reasons, and others stated by JUSTICE BLACKMUN in his thorough opinion, I would affirm the judgment of the Court of Appeals.

WILDER, GOVERNOR OF VIRGINIA, ET AL. *v.* VIRGINIA HOSPITAL ASSOCIATION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 88–2043. Argued January 9, 1990—Decided June 14, 1990

To qualify for federal financial assistance to help defray the cost of furnishing medical care to the needy under the Medicaid Act, States must submit to the Secretary of Health and Human Services for approval a plan which, *inter alia*, establishes a scheme for reimbursing health care providers. In 1980, Congress passed the Boren Amendment to the Act, which requires provider reimbursement according to rates that the "State finds, and makes assurances satisfactory to the Secretary," are "reasonable and adequate" to meet the costs of "efficiently and economically operated facilities." The State must also assure the Secretary that individuals have "reasonable access" to facilities of "adequate quality." Virginia's plan, under which providers are reimbursed according to a prospective formula, was approved by the Secretary in 1982 and again in 1986 after an amendment. In 1986, respondent, a nonprofit corporation composed of public and private hospitals operating in Virginia, filed suit against petitioner state officials for declaratory and injunctive relief under 42 U. S. C. § 1983, alleging that the state plan violates the Act because its reimbursement rates are not "reasonable and adequate." The District Court denied petitioners' motion to dismiss or for summary judgment, which was based on the claim that § 1983 does not afford respondent a cause of action. The Court of Appeals affirmed, concluding that providers may sue state officials for declaratory and injunctive relief under § 1983 to assure compliance with the Boren Amendment.

Held: The Boren Amendment is enforceable in a § 1983 action for declaratory and injunctive relief brought by health care providers. Pp. 508–524.

(a) Section 1983—which provides a cause of action for the "deprivation of any rights . . . secured by [federal] laws"—is inapplicable if (1) the statute in question does not create enforceable "rights" within § 1983's meaning, or (2) Congress has foreclosed such enforcement of the statute in the enactment itself. *Wright* v. *Roanoke Redevelopment and Housing Authority*, 479 U. S. 418, 423. P. 508.

(b) The Boren Amendment creates a substantive federal "right," enforceable by providers under § 1983, to the adoption of reasonable and adequate reimbursement rates. There can be little doubt that providers are the intended beneficiaries of the amendment, see *Golden State Tran-*

sit Corp. v. *Los Angeles*, 493 U. S. 103, 106, since the amendment establishes a system for reimbursing such providers and is phrased in terms benefiting them. Moreover, the amendment imposes a "binding obligation" on the States that gives rise to enforceable rights, see *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 19, since it is cast in mandatory rather than precatory terms, and since the provision of federal funds is expressly conditioned on compliance with the amendment. Petitioners' contention that Congress did not intend to require States to adopt rates that actually are reasonable and adequate is contrary to the statutory language, which requires the State to *find* that its rates satisfy these requirements and entitles the Secretary to reject a state plan upon concluding that the assurances given are unsatisfactory, and would render those requirements, and thus the entire reimbursement provision, essentially meaningless. Petitioners' contention is quickly dispelled by a review of the amendment's background and the legislative history, which demonstrate that the amendment was passed to free the States from restrictive reimbursement requirements previously imposed by the Secretary and not to relieve them of their fundamental obligation to pay reasonable rates, and that Congress intended to retain providers' pre-existing right to challenge rates as unreasonable in injunctive suits under § 1983. Furthermore, a State's flexibility to adopt rates that it finds to be reasonable and adequate does not, as petitioners contend, render the obligation imposed by the amendment too "vague and amorphous" to be judicially enforceable. See *Golden State*, *supra*, at 106. The statute and the Secretary's regulations set out factors which a State must consider in adopting its rates, and the statute requires the State, in making its findings, to judge the rates' reasonableness against the objective benchmark of an "efficiently and economically operated facility" while ensuring "reasonable access" to eligible participants. Although some knowledge of the hospital industry might be required to evaluate a State's findings, such an inquiry is well within the competence of the Judiciary. Pp. 509–520.

(c) Congress has not foreclosed a private judicial remedy for enforcement of the Boren Amendment under § 1983, since there is no express provision to that effect in the Act, see *Wright*, *supra*, at 423, and since the statute does not create a remedial scheme that is sufficiently comprehensive to demonstrate an intent to preclude the remedy of § 1983 suits, see *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1, 20. Because a primary purpose of the amendment was to reduce the Secretary's role in determining rate payment calculation methods, the Secretary's limited oversight function under the Act, which authorizes him to withhold approval of plans or to curtail federal funds in cases of noncompliance, is insufficient to demonstrate an intent

to foreclose § 1983 relief. Cf. *Wright*, *supra*, at 428. Moreover, although a regulation requires States to adopt an appeals procedure by which individual providers may obtain administrative review of reimbursement rates, it also allows States to limit the issues that may be raised on review, and most States, including Virginia, do not allow providers to challenge the overall method by which rates are determined. Such limited state procedures cannot be considered a "comprehensive" scheme that precludes reliance on § 1983. See 479 U. S., at 429. Pp. 520–523.

868 F. 2d 653, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. REHNQUIST, C. J., filed a dissenting opinion, in which O'CONNOR, SCALIA, and KENNEDY, JJ., joined, *post*, p. 524.

R. Claire Guthrie, Deputy Attorney General of Virginia, argued the cause for petitioners. With her on the briefs were *Mary Sue Terry*, Attorney General, *Roger L. Chaffe*, Senior Assistant Attorney General, and *Pamela M. Reed* and *Virginia R. Manhard*, Assistant Attorneys General.

Deputy Solicitor General Roberts argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Gerson*, *Lawrence S. Robbins*, *Anthony J. Steinmeyer*, and *Irene M. Solet*.

Walter Dellinger argued the cause for respondent. With him on the brief were *Martin A. Donlan, Jr.*, and *Judith B. Henry*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Connecticut et al. by *Clarine Nardi Riddle*, Attorney General of Connecticut, and *Richard J. Lynch*, *Arnold I. Menchel*, and *Kenneth A. Graham*, Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *Don Siegelman* of Alabama, *Douglas B. Baily* of Alaska, *Robert K. Corbin* of Arizona, *John K. Van de Kamp* of California, *Duane Woodard* of Colorado, *Charles M. Oberly III* of Delaware, *Robert A. Butterworth* of Florida, *Michael J. Bowers* of Georgia, *Warren Price III* of Hawaii, *Jim Jones* of Idaho, *Neil F. Hartigan* of Illinois, *Linley E. Pearson* of Indiana, *Thomas J. Miller* of Iowa, *Robert T. Stephan* of Kansas, *Frederic J. Cowan* of Kentucky, *William J. Guste, Jr.*, of Louisiana, *James E. Tierney* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *James*

JUSTICE BRENNAN delivered the opinion of the Court.

This case requires us to determine whether a health care provider may bring an action under 42 U. S. C. § 1983 (1982 ed.)[1] to challenge the method by which a State reimburses health care providers under the Medicaid Act (Act), 79 Stat. 343, as amended, 42 U. S. C. § 1396 *et seq.* (1982 ed. and Supp. V). More specifically, the question presented is whether the Boren Amendment to the Act, which requires reimbursement according to rates that a "State finds, and makes assurances satisfactory to the Secretary, are rea-

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M. Shannon of Massachusetts, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *Mike Moore* of Mississippi, *William L. Webster* of Missouri, *Marc Racicot* of Montana, *Brian McKay* of Nevada, *John P. Arnold* of New Hampshire, *Peter N. Perretti, Jr.*, of New Jersey, *Hal Stratton* of New Mexico, *Robert Abrams* of New York, *Lacy H. Thornburg* of North Carolina, *Nicholas J. Spaeth* of North Dakota, *Anthony J. Celebrezze, Jr.*, of Ohio, *Robert H. Henry* of Oklahoma, *David Frohnmayer* of Oregon, *Ernest D. Preate, Jr.*, of Pennsylvania, *James E. O'Neil* of Rhode Island, *T. Travis Medlock* of South Carolina, *Roger Tellinghuisen* of South Dakota, *Charles W. Burson* of Tennessee, *Jim Mattox* of Texas, *Paul Van Dam* of Utah, *Jeffrey L. Amestoy* of Vermont, *Kenneth Eikenberry* of Washington, *Charles G. Brown* of West Virginia, and *Joseph B. Meyer* of Wyoming; and for the National Governors' Association et al. by *Benna Ruth Solomon.*

Briefs of *amici curiae* urging affirmance were filed for the American Health Care Association et al. by *Thomas C. Fox, Joel M. Hamme, Eugene Tillman, W. Thomas McGough, Jr., Rex E. Lee,* and *Carter G. Phillips;* for the California Association of Hospitals et al. by *Robert A. Klein, Mark S. Windisch,* and *C. Darryl Cordero;* and for Temple University by *Matthew M. Strickler.*

Robert D. Newman filed a brief for the Gray Panthers Advocacy Committee et al. as *amici curiae.*

[1] Section 1983 provides in relevant part:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

sonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities," 42 U. S. C. § 1396a(a)(13)(A) (1982 ed., Supp. V), is enforceable in an action pursuant to § 1983.

I

A

Medicaid is a cooperative federal-state program through which the Federal Government provides financial assistance to States so that they may furnish medical care to needy individuals. § 1396. Although participation in the program is voluntary, participating States must comply with certain requirements imposed by the Act and regulations promulgated by the Secretary of Health and Human Services (Secretary). To qualify for federal assistance, a State must submit to the Secretary and have approved a "plan for medical assistance," § 1396a(a), that contains a comprehensive statement describing the nature and scope of the State's Medicaid program. 42 CFR § 430.10 (1989). The state plan is required to establish, among other things, a scheme for reimbursing health care providers for the medical services provided to needy individuals.

Section 1902(a)(13) of the Act sets out the requirements for reimbursement of health care providers. As amended in 1980 (Boren Amendment),[2] the section provides that

> "a State plan for medical assistance must—
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> . . . . .
>
> "provide . . . for payment . . . of the hospital services, nursing facility services, and services in an intermediate

[2] In 1980, Congress enacted the Boren Amendment which changed the standard for reimbursement of nursing and intermediate care facilities. Pub. L. 96–499, § 962(a), 94 Stat. 2650. The following year Congress extended the Boren Amendment's standard for reimbursement to hospitals. Pub. L. 97–35, § 2173, 95 Stat. 808. Since then the reimbursement standard has been applied to payments made to intermediate care facilities for the mentally retarded. Pub. L. 100–203, § 4211(h)(2)(A), 101 Stat. 1330–205.

> care facility for the mentally retarded provided under the plan through the use of rates (determined in accordance with methods and standards developed by the State . . .) *which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities* in order to provide care and services in conformity with applicable State and Federal laws, regulations, and quality and safety standards and to assure that individuals eligible for medical assistance have reasonable access . . . to inpatient hospital services of adequate quality." 42 U. S. C. § 1396a(a)(13)(A) (1982 ed., Supp. V) (emphasis added).

The Commonwealth of Virginia's State Plan for Medical Assistance was approved by the Secretary in 1982 and again in 1986 after an amendment was made. Complaint, ¶ 11, App. 11. Under the plan, health care providers are reimbursed for services according to a prospective formula—that is, reimbursement rates for various types of medical services and procedures are fixed in advance. Specifically, providers are divided into "peer groups" based on their size and location and reimbursed according to a formula based on the median cost of medical care for that peer group.

In 1986, respondent Virginia Hospital Association (VHA), a nonprofit corporation composed of both public and private hospitals operating in Virginia, *id.*, at ¶ 3, App. 4–5, filed suit in the United States District Court for the Eastern District of Virginia against several state officials including the Governor, the Secretary of Human Resources, and the members of the State Department of Medical Assistance Services (the state agency that administers the Virginia Medicaid system). Respondent contends that Virginia's plan for reimbursement violates the Act because the "rates are not reasonable and adequate to meet the economically and efficiently incurred cost of providing care to Medicaid patients in hospitals and do not assure access to inpatient care." *Id.*, at ¶ 1, App. 4; see also

id., at ¶ 17, App. 13 ("The per diem reimbursement rates . . . have not reasonably nor adequately met the costs incurred by efficiently and economically operated hospitals in providing care and services in conformity with applicable state and federal laws, regulations, and quality and safety standards").[3] Respondent seeks declaratory and injunctive relief including an order requiring petitioners to promulgate a new state plan providing new rates and, in the interim, to reimburse Medicaid providers at rates commensurate with payments under the Medicare program. *Id.*, at ¶¶ 34–39, App. 20–22.

Petitioners filed a motion to dismiss or in the alternative a motion for summary judgment on the ground that 42 U. S. C. § 1983 (1982 ed.) does not afford respondent a cause of action to challenge the Commonwealth's compliance with the Medicaid Act. 2 Record, Exh. 36, p. 1.[4] The District

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[3] Virginia's current formula for reimbursement rates takes the median cost of care for each peer group as computed for 1982 and adjusts the costs annually to account for inflation. The figures for the median cost of care in 1982 were calculated by determining the per diem median cost of care for a Medicaid patient in the year 1981 and then adjusting for inflation through the use of the Consumer Price Index (CPI). Until 1986, to determine the annual reimbursment rates, the 1982 baseline figures were adjusted by the CPI. In 1986, however, the plan was amended so that these baseline figures are adjusted by an inflation index that is tied to medical care costs. App. 24–26.

Respondent argues that this method of calculating the payment rates is not tied to the costs incurred by an efficient and economical hospital. More specifically, respondent challenges: (1) the method of computing the baseline median costs for 1982; (2) the use of the CPI rather than an index tied to medical care costs to adjust the rates in the years 1982–1986; and (3) the way in which the medical care cost index was used after 1986. Complaint, ¶¶ 20–26, App. 14–16. In addition, respondent contends that the appeals procedure established by the state plan is inadequate under the Act in part because it excludes challenges to the principles of reimbursement. *Id.*, at ¶ 32, App. 19.

[4] The District Court initially granted petitioners' motion to dismiss on grounds of collateral estoppel. 1 Record, Exhs. 20 and 21. The Court of Appeals reversed. *Virginia Hospital Assn.* v. *Baliles*, 830 F. 2d 1308 (CA4 1987). On remand petitioners raised numerous challenges to the jus-

Court denied the motion. App. to Pet. for Cert. D–4—D–6. The Court of Appeals for the Fourth Circuit affirmed, concluding that health care providers may sue state officials for declaratory and injunctive relief under § 1983 to ensure compliance with the Act. More specifically, the court held that the language and legislative history of the Boren Amendment demonstrate that it creates "enforceable rights" and that Congress did not intend to foreclose a private remedy for the enforcement of those rights. *Virginia Hospital Assn.* v. *Baliles*, 868 F. 2d 653, 656–660 (1989). We granted certiorari. 493 U. S. 808 (1989).[5]

B

In order to determine whether the Boren Amendment is enforceable under § 1983, it is useful first to consider the history of the reimbursement provision. When enacted in 1965, the Act required States to provide reimbursement for the "reasonable cost" of hospital services actually provided, measured according to standards adopted by the Secretary. Pub. L. 89–97, § 1902(13)(B), 79 Stat. 346. Congress became concerned, however, that the Secretary wielded too much control over reimbursement rates. See H. R. Rep. No. 92–231, p. 100 (1971). Congress therefore amended the Act in 1972 to give States more flexibility to develop methods and standards for reimbursement, but Congress retained the ultimate requirement that the rates reimburse the "reasonable cost" of the services provided. The new law required States to pay "the reasonable cost of inpatient hospital services . . . as determined in accordance with methods and standards

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ticiability of the lawsuit, including an argument based on the Eleventh Amendment. The Court of Appeals rejected this argument on the ground that the suit seeks only prospective injunctive relief against state officials. *Virginia Hospital Assn.* v. *Baliles*, 868 F. 2d 653, 662 (CA4 1989).

[5] We previously granted certiorari to decide this issue in *Coos Bay Care Center* v. *Oregon Dept. of Human Resources*, 803 F. 2d 1060 (CA9 1986), vacated as moot, 484 U. S. 806 (1987).

which shall be developed by the State and reviewed and approved by the Secretary." Pub. L. 92–603, § 232(a), 86 Stat. 1410–1411.

In response to rapidly rising Medicaid costs, Congress in 1981 extended the Boren Amendment to hospitals, as part of the Omnibus Budget Reconciliation Act of 1981, Pub. L. 97–35, 95 Stat. 808.[6] Congress blamed mounting Medicaid costs on the complexity and rigidity of the Secretary's reimbursement regulations. See H. R. Rep. No. 97–158, Vol. 2, pp. 292–293 (1981); S. Rep. No. 96–471, pp. 28–29 (1979). Although the previous version of the Act in theory afforded States some degree of flexibility to adopt their own methods for determining reimbursement rates, Congress found that, in fact, the regulations promulgated by the Secretary had essentially forced States to adopt Medicaid rates based on Medicare "reasonable cost" principles. Congress "recognize[d] the inflationary nature of the [then] current cost reimbursement system and intend[ed] to give States greater latitude in developing and implementing alternative reimbursement methodologies that promote the efficient and economical delivery of such services." H. R. Rep. No. 97–158, Vol. 2, *supra*, at 293. The amendment "delete[d] the current provision requiring States to reimburse hospitals on a reasonable cost basis [and] substitute[d] a provision requiring States to reimburse hospitals at rates . . . that are reasonable and adequate to meet the cost which must be incurred by efficiently and economically operated facilities in order to meet applicable laws and quality and safety standards." S. Rep. No. 97–139, p. 478 (1981). Thus, while Congress affirmed its desire that state reimbursement rates be "reasonable," it afforded States greater flexibility in calculating those "reasonable rates." For example, Congress explained that States would be free to establish statewide or classwide rates, establish rates based on a prospective

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[6] See n. 2, *supra*.

cost,[7] or include incentive provisions to encourage efficient operation. See H. R. Rep. No. 97–158, Vol. 2, *supra*, at 292–293; S. Rep. No. 96–471, *supra*, at 29. Flexibility was ensured by limiting the oversight role of the Secretary. See S. Rep. No. 97–139, *supra*, at 478. Thus, the Boren Amendment provides that a State must reimburse providers according to rates that it "finds, and makes assurances satisfactory to the Secretary," are "reasonable and adequate" to meet the costs of "efficiently and economically operated facilities." The State must also assure the Secretary that individuals have "reasonable access" to facilities of "adequate quality."

The Act does not define these terms, and the Secretary has declined to adopt a national definition, concluding that States should determine the factors to be considered in determining what rates are "reasonable and adequate" to meet the costs of "efficiently and economically operated facilit[ies]." See 48 Fed. Reg. 56049 (1983). The regulations require a State to make a finding at least annually that its rates are "reasonable and adequate," see 42 CFR § 447.253(b)(1) (1989), though the State is required to submit assurances to that effect to the Secretary only when it makes a change in its reimbursement rates. See § 447.253(a); 48 Fed. Reg. 56047 (1983). According to the Secretary, the Boren Amendment "places the responsibility for the development of reasonable and adequate payment rates with the States." *Id.*, at 56050. Thus, he reviews only the reasonableness of the assurances provided by a State and not the State's findings themselves.

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[7] Before the passage of the Boren Amendment, state plans provided for reimbursement on a retrospective basis; that is, health care providers were reimbursed according to the reasonable cost of the services *actually* provided. Since the passage of the Boren Amendment in 1981, however, most States have adopted plans that are prospective in nature, whereby providers are paid in advance and payments are calculated according to the State's formula for what such care *should* cost. The Virginia plan is a typical prospective plan.

See 42 CFR § 447.256(2) (1989). The Secretary's review focuses "on the assurances which attest to the fact that States' findings do indeed indicate that the payment rates are reasonable" and judges "whether the assurances are satisfactory." 48 Fed. Reg. 56051 (1983). Therefore the Secretary does not require States to submit the findings themselves or the underlying data.[8]

II

Section 1983 provides a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. In *Maine* v. *Thiboutot*, 448 U. S. 1, 4 (1980), we held that § 1983 provides a cause of action for violations of federal statutes as well as the Constitution. We have recognized two exceptions to this rule. A plaintiff alleging a violation of a federal statute will be permitted to sue under § 1983 unless (1) "the statute [does] not create enforceable rights, privileges, or immunities within the meaning of § 1983," or (2) "Congress has foreclosed such enforcement of the statute in the enactment itself." *Wright* v. *Roanoke Redevelopment and Housing Authority*, 479 U. S. 418, 423 (1987).[9] Petitioners argue first that the

[8] The state Medicaid agency must submit the following information with the assurances: (1) the amount of the estimated average proposed payment rate for each type of provider, (2) the amount by which the rate is increased or decreased in relation to the preceding year, and (3) an estimate of the short-term, and to the extent feasible, long-term, effect the new rate will have on the availability of services, the type of care furnished, the extent of provider participation, and the degree to which costs are covered in hospitals that serve a disproportionate number of low-income patients. 42 CFR § 447.255 (1989). The Secretary may, however, request a State to provide additional background information if he believes it is necessary for a complete review of the State's assurances. 48 Fed. Reg. 56050 (1983).

[9] This is a different inquiry than that involved in determining whether a private right of action can be implied from a particular statute. See *Cort* v. *Ash*, 422 U. S. 66 (1975). In implied right of action cases, we employ the four-factor *Cort* test to determine "whether Congress intended to create the private remedy asserted" for the violation of statutory rights. See *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11, 15–16 (1979);

Boren Amendment does not create any "enforceable rights" and second, that Congress has foreclosed enforcement of the Act under § 1983. We address these contentions in turn.

A

"Section 1983 speaks in terms of '*rights*, privileges, or immunities,' not violations of federal law." *Golden State Transit Corp.* v. *Los Angeles*, 493 U. S. 103, 106 (1989) (emphasis added). We must therefore determine whether the Boren Amendment creates a "federal right" that is enforceable under § 1983. Such an inquiry turns on whether "the provision in question was intend[ed] to benefit the putative plaintiff." *Ibid.* (citations and internal quotations omitted). If so, the provision creates an enforceable right unless it reflects merely a "congressional preference" for a certain kind of conduct rather than a binding obligation on the governmental unit, *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 19 (1981), or unless the interest the plaintiff asserts is "'too vague and amorphous'" such that it is "'beyond the competence of the judiciary to enforce.'" *Golden State*, *supra*, at 106 (quoting *Wright*, *supra*, at 431–432). Under this test, we conclude that the Act creates a right enforceable by health care providers under § 1983 to

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Touche Ross & Co. v. *Redington*, 442 U. S. 560, 575–576 (1979). The test reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes. See, *e. g.*, *Thompson* v. *Thompson*, 484 U. S. 174, 191–192 (1988) (SCALIA, J., concurring in judgment); *Cannon* v. *University of Chicago*, 441 U. S. 677, 742–749 (1979) (Powell, J., dissenting). Because § 1983 provides an "alternative source of *express* congressional authorization of private suits," *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1, 19 (1981), these separation-of-powers concerns are not present in a § 1983 case. Consistent with this view, we recognize an exception to the general rule that § 1983 provides a remedy for violation of federal statutory rights only when Congress has affirmatively withdrawn the remedy. See *Golden State Transit Corp.* v. *Los Angeles*, 493 U. S. 103, 106–107 (1989); *Wright* v. *Roanoke Redevelopment and Housing Authority*, 479 U. S. 418, 423–424 (1987).

the adoption of reimbursement rates that are reasonable and adequate to meet the costs of an efficiently and economically operated facility that provides care to Medicaid patients. The right is not merely a procedural one that rates be accompanied by findings and assurances (however perfunctory) of reasonableness and adequacy; rather the Act provides a substantive right to reasonable and adequate rates as well.

There can be little doubt that health care providers are the intended beneficiaries of the Boren Amendment. The provision establishes a system for reimbursement of providers and is phrased in terms benefiting health care providers: It requires a state plan to provide for "payment . . . of the *hospital* services, *nursing facility* services, and services in an *intermediate care facility* for the mentally retarded provided under the plan." 42 U. S. C. § 1396a(a)(13)(A) (1982 ed., Supp. V) (emphasis added). See *Wright*, *supra*, at 430. The question in this case is whether the Boren Amendment imposes a "binding obligation" on the States that gives rise to enforceable rights.

In *Pennhurst*, *supra*, the Court held that § 111 of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U. S. C. § 6010 (1976 ed. and Supp. III), did not create rights enforceable under § 1983. Section 6010, the "bill of rights" provision, declared that Congress had made certain "findings respecting the rights of persons with developmental disabilities," namely, that such persons have a right to "appropriate treatment'" in the least restrictive environment and that federal and state governments have an obligation to ensure that institutions failing to provide "appropriate treatment" do not receive federal funds. 451 U. S., at 13. The Court concluded that the context of the entire statute and its legislative history revealed that Congress intended neither to create new substantive rights nor to require States to recognize such rights; instead, Congress intended only to indicate a preference for "appropriate treatment." *Id.*, at 22–24. The Court examined the language of the provision and deter-

mined that a general statement of "findings" was "too thin a reed to support" a creation of rights and obligations. *Id.*, at 19. Moreover, since neither the statute nor the corresponding regulations made compliance with the provision a condition of receipt of federal funding, the Court reasoned that "the provisions of § 6010 were intended to be hortatory, not mandatory." *Id.*, at 24. The Court refused to infer congressional intent to condition federal funding on compliance because "Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds." *Ibid.*[10]

More recently, in *Wright*, however, we found that the Brooke Amendment to the Housing Act of 1937, 42 U. S. C. § 1437a (1982 ed. and Supp. III), and its implementing regulations did create rights enforceable under § 1983. The Brooke Amendment limits the amount of rent a public housing tenant can be charged, and the regulations adopted pursuant to the statute require inclusion of a "reasonable" allowance for utilities in the rent. 479 U. S., at 420. We reasoned that both the statute and the regulations were "mandatory limitation[s] focusing on the individual family and its income." *Id.*, at 430. In addition, we rejected the argument that the provision for a reasonable utility allotment was too vague to create an enforceable right. Because the regulations set out guidelines for the housing authorities to follow in determining the utility allowance, the right was "sufficiently specific and defi-

[10] That Congress granted the States only $1.6 million, "a sum woefully inadequate to meet the enormous financial burden of providing 'appropriate' treatment in the 'least restrictive'" alternative also supported the Court's conclusion that Congress had a limited purpose in mind when it enacted § 6010. 451 U. S., at 24. By contrast, under the Medicaid program, the Federal Government provides funds to cover between 50% and 83% of the cost of patient care. See 42 U. S. C. § 1396d(b) (1982 ed., Supp. V). In 1988, the federal contribution to the Medicaid program totaled approximately $29 billion. Brief for United States as *Amicus Curiae* 2.

nite to qualify as [an] enforceable righ[t] under *Pennhurst* and § 1983 [and was] not . . . beyond the competence of the judiciary to enforce." *Id.*, at 432.

In light of *Pennhurst* and *Wright*, we conclude that the Boren Amendment imposes a binding obligation on States participating in the Medicaid program to adopt reasonable and adequate rates and that this obligation is enforceable under § 1983 by health care providers. The Boren Amendment is cast in mandatory rather than precatory terms: The state plan "*must*" "provide for payment . . . of hospital[s]" according to rates the State finds are reasonable and adequate. 42 U. S. C. § 1396a(a)(13)(A) (1982 ed., Supp. V) (emphasis added). Moreover, provision of federal funds is expressly conditioned on compliance with the amendment and the Secretary is authorized to withhold funds for noncompliance with this provision. 42 U. S. C. § 1396c (1982 ed.). The Secretary has expressed his intention to withhold funds if the state plan does not comply with the statute or if there is "noncompliance in practice." See 42 CFR § 430.35 (1989) ("A question of noncompliance in practice may arise from the State's failure to actually comply with a Federal requirement, regardless of whether the plan itself complies with that requirement"). "The [Boren Amendment's] language succinctly sets forth a congressional command, which is wholly uncharacteristic of a mere suggestion or 'nudge.'" *West Virginia University Hospitals, Inc.* v. *Casey*, 885 F. 2d 11, 20 (CA3 1989) (quoting *Pennhurst*, 451 U. S., at 19), cert. granted, 494 U. S. 1003 (1990).

Petitioners concede that the Boren Amendment requires a State to provide *some* level of reimbursement to health care providers and that a cause of action would lie under § 1983 if a State failed to adopt any reimbursement provision whatsoever. Tr. of Oral Arg. 12. Petitioners also concede, as they must, that a State is required to find that its rates are reasonable and adequate and to make assurances to that effect to

the Secretary. Reply Brief for Petitioners 3.[11] The dissent, although acknowledging that the State has these obligations, apparently would hold that the only right enforceable under § 1983 is the right to compel compliance with these bare procedural requirements. See *post*, at 527–528. We think the amendment cannot be so limited. Any argument that the requirements of findings and assurances are procedural requirements only and do not require the State to adopt rates that are actually reasonable and adequate is nothing more than an argument that the State's findings and assurances need not be correct.

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[11] The United States, as *amicus curiae*, argues that the statute requires only that a State provide assurances to the Secretary that its rates comply with the statute and that assurances do not give rise to enforceable rights. Brief for United States as *Amicus Curiae* 16 ("By its terms, therefore, [the Boren Amendment] vests ratemaking discretion in the States, subject only to the condition that they make 'assurances' satisfactory to the Secretary"). This interpretation ignores the language of the statute that requires a State to *find* that its rates are "reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities" and to assure that eligible individuals have "reasonable access" to services. See also 42 CFR § 447.253(b) (1989); 48 Fed. Reg. 56051 (1983) ("The statute requires that the States make a finding that their payment rates are reasonable and adequate to meet the costs of efficiently and economically operated facilities"). The requirement that a State make such a finding is a necessary prerequisite to the subsequent requirement that the State provide "assurances" to the Secretary. That the requirements are separate obligations is apparent from the Secretary's regulations. A State must make findings at least annually, but does not need to make assurances unless the state plan is amended. 42 CFR §§ 447.253(a), (b) (1989). Moreover, the Secretary's interpretation of his role under the statute—that he will review the reasonableness of the assurances presented by a State rather than the findings themselves—is based entirely on his understanding that a State has the responsibility to *find* that its rates are adequate before making assurances to the Secretary. See 48 Fed. Reg. 56050 (1983) ("Because of the explicit statutory responsibility of the State agency to make its findings that the method and standards result in reasonable and adequate payment rates, we doubt that requiring further detailed reporting would add substantially to our evaluation of States' assurances").

We reject that argument because it would render the statutory requirements of findings and assurances, and thus the entire reimbursement provision, essentially meaningless. It would make little sense for Congress to require a State to make findings without requiring those findings to be correct. In addition, there would be no reason to require a State to submit assurances to the Secretary if the statute did not require the State's findings to be reviewable in some manner by the Secretary. We decline to adopt an interpretation of the Boren Amendment that would render it a dead letter. See *Rosado* v. *Wyman*, 397 U. S. 397, 412–415 (1970); see also 2A C. Sands, Sutherland on Statutory Construction § 45.12 (4th ed. 1984).

Petitioners acknowledge that a State may not make, or submit assurances based on, a patently false finding, see Tr. of Oral Arg. 7, but insist that Congress left it to the Secretary, and not the federal courts, to ensure that the State's rates are not based on such false findings.[12] To the extent that this argument bears on the question whether the Boren Amendment creates enforceable rights (as opposed to whether Congress intended to foreclose private enforcement of the statute pursuant to § 1983, see *infra*, at 520–523), it supports the conclusion that the provision does create enforceable rights. If the Secretary is entitled to reject a state plan upon concluding that a State's assurances of compliance are unsatisfactory, see *supra*, at 512, a State is on notice that it cannot adopt any rates it chooses and that the requirement that it make "findings" is not a mere formality. Cf. *Pennhurst*, *supra*, at 24. Rather, the only plausible interpre-

[12] Petitioners suggest that health care providers might be able to bring a challenge against the Secretary's decision to approve a plan under the judicial review provisions of the Administrative Procedure Act (APA), 5 U. S. C. §§ 701–706. The United States, however, argues that there would be no remedy under the APA because the decision to accept a States' assurances is entrusted to the agency's discretion. See Tr. of Oral Arg. 18–19. We need not address this dispute, however, because it is irrelevant to the question whether the Boren Amendment creates rights enforceable against States under § 1983.

tation of the amendment is that by requiring a State to *find* that its rates are reasonable and adequate, the statute imposes the concomitant obligation to adopt reasonable and adequate rates.

Any doubt that Congress intended to require States to adopt rates that actually are reasonable and adequate is quickly dispelled by a review of the legislative history of the Boren Amendment. The primary objective of the amendment was to free States from reimbursement according to Medicare "reasonable cost" principles as had been required by prior regulation. The amendment "delete[d] the . . . provision requiring States to reimburse hospitals on a reasonable cost basis. It substitute[d] a provision *requiring States to reimburse hospitals at rates . . . that are reasonable and adequate* to meet the cost which must be incurred by efficiently and economically operated facilities in order to meet applicable laws and quality and safety standards." S. Rep. No. 97–139, at 478 (emphasis added). In passing the Boren Amendment, Congress sought to decentralize the method for determining rates, but not to eliminate a State's fundamental obligation to pay reasonable rates. See S. Rep. No. 96–471, at 29 (flexibility given to States "not intended to encourage arbitrary reductions in payment that would adversely affect the quality of care"). In other words, while Congress gave States leeway in adopting a method of computing rates—they can choose between retrospective and prospective rate-setting methodologies, for example—Congress retained the underlying requirement of "reasonable and adequate" rates.[13]

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[13] The House and Senate Reports are replete with indications that Congress intended that States actually adopt rates that are "reasonable and adequate." The Conference Committee Report explains that "the conferees intend that State hospital reimbursement policies should meet the costs that must be incurred by efficiently-administered hospitals in providing covered care and services to medicaid eligibles as well as the costs required to provide care in conformity with State and Federal requirements." H. R. Conf. Rep. No. 97–208, p. 962 (1981); see S. Rep. No. 97–139, p. 478 (1981) (amendment requires "States to reimburse hospitals at rates . . . that are reasonable and adequate to meet the costs which must be in-

By reducing the Secretary's role in establishing the rates, Congress intended only that the primary responsibility for developing rates be transferred to the States; the Secretary was still to ensure compliance with the provision. See S. Rep. No. 97–139, at 478 ("The committee expects that the Secretary will keep regulatory and other requirements to the *minimum necessary to assure proper accountability*, and not to overburden the States and facilities with unnecessary and burdensome paperwork requirements") (emphasis added); H. R. Conf. Rep. No. 96–1479, p. 154 (1980) ("[T]he Secretary retains final authority to review the rates and to disapprove [them] if they do not meet the requirements of the statute"). If petitioners were right that state findings were not required to be correct, there would be little point in requiring the Secretary to review the State's assurances.

Moreover, it is clear that prior to the passage of the Boren Amendment, Congress intended that health care providers be able to sue in federal court for injunctive relief to ensure that they were reimbursed according to reasonable rates. During the 1970's, provider suits in the federal courts were commonplace.[14] In addition, in response to several States

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curred by efficiently and economically operated facilities"); H. R. Rep. No. 97–158, Vol. 2, pp. 293–294 (1981) ("In permitting States greater flexibility in reimbursement system design, the Committee intends the States to ensure that such alternative systems provide fair and adequate compensation for services to Medicaid beneficiaries. . . . The Committee believes that hospitals should be paid for the cost of their care to Medicaid patients in the most economical manner"); see also Medicaid and Medicare Amendments: Hearings on H. R. 4000 before the Subcommittee on Health and the Environment of the House Committee on Interstate and Foreign Commerce, 96th Cong., 1st Sess., 845 (1979) (statement of Sen. Boren) (amendment "places responsibility squarely on the States to establish adequate payments"); 126 Cong. Rec. 17885 (1980) (the "amendment . . . achieves the present law's objective of assuring high-quality care" and "differs from the present law with respect to the methods States may employ in determining reasonable and adequate rates") (colloquy between Sen. Pryor and Sen. Boren).

[14] See, *e. g.*, *Alabama Nursing Home Assn.* v. *Harris*, 617 F. 2d 388, 395–396 (CA5 1980); *California Hospital Assn.* v. *Obledo*, 602 F. 2d 1357,

freezing their Medicaid payments to health care providers, Congress amended the Act in 1975 to require States to waive any Eleventh Amendment immunity from suit for violations of the Act. See H. R. Rep. No. 94–1122, p. 4 (1976); see also 121 Cong. Rec. 42259 (1975) (remarks of Sen. Taft). Congress believed the waiver necessary because the existing means of enforcement—noncompliance procedures instituted by the Secretary or suits for injunctive relief by health care providers—were insufficient to deal with the problem of outright noncompliance because they included no compensation for past underpayments. See H. R. Rep. No. 94–1112, *supra*, at 4. The amendment required the Secretary to withhold 10% of federal Medicaid funds from any State that had not executed a waiver of its immunity by March 31, 1976. Pub. L. 94–182, § 111, 89 Stat. 1054. The provision generated a great deal of opposition from the States and was repealed in the next session of Congress. Pub. L. 94–552, 90 Stat. 2540; see H. R. Rep. No. 94–1122, *supra*, at 4; S. Rep. No. 94–1240, pp. 3–4 (1976); 122 Cong. Rec. 13492 (1976) (remarks of Rep. Rogers). But Congress explained that it did not intend the repeal to "be construed as in any way contravening or constraining the rights of the providers of Medicaid services, the State Medicaid agencies, or the Department to seek prospective, injunctive relief in a federal or state judicial forum. Neither should the repeal of [the waiver section] be interpreted as placing constraints on the rights of the par-

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1363 (CA9 1979); *Minnesota Assn. of Health Care Facilities* v. *Minnesota Dept. of Public Welfare*, 602 F. 2d 150, 154 (CA8 1979); *Hospital Assn. of New York State, Inc.* v. *Toia*, 577 F. 2d 790 (CA2 1978); *Massachusetts General Hospital* v. *Weiner*, 569 F. 2d 1156, 1157–1158 (CA1 1978); *St. Mary's Hospital of East St. Louis, Inc.* v. *Ogilvie*, 496 F. 2d 1324, 1326–1328 (CA7 1974); *Catholic Medical Center of Brooklyn and Queens, Inc., Div. of St. Mary's Hospital* v. *Rockefeller*, 430 F. 2d 1297, 1298 (CA2), app. dism'd, 400 U. S. 931 (1970). Cf. *National Union of Hospital and Health Care Employees, RWDSU, AFL–CIO* v. *Carey*, 557 F. 2d 278, 280–281 (CA2 1977) (although providers may sue, union representing employees of provider may not sue).

ties involved to seek such prospective, injunctive relief." S. Rep. No. 94–1240, at 4.[15]

This experience demonstrates clearly that Congress and the States both understood the Act to grant health care providers enforceable rights both before and after repeal of the ill-fated waiver requirement.[16] Given this background, it is implausible to conclude that by substituting the requirements

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[15] See, *e. g.*, H. R. Rep. No. 94–1122, p. 7 (1976) ("[P]roviders can continue, of course, to institute suit for injunctive relief in State or Federal courts, as necessary") (letter from Department of Health, Education and Welfare); State Compliance with Federal Medicaid Requirements: Hearings before the Subcommittee on Health of the Senate Committee on Finance, 94th Cong., 2d Sess., 3 (1976) (providers' recourse, without amendment, includes "injunctive relief against State officials") (remarks of Assistant Secretary Kurzman); 122 Cong. Rec. 13492 (1976) ("Although the provider can sue the State to enjoin action, they *[sic]* cannot sue to recover 'lost funds' because of the immunity to suit afforded States by the 11th Amendment") (remarks of Rep. Rogers).

[16] Indeed, federal courts have continued to entertain such challenges since the passage of the Boren Amendment. All the Circuits that have explicitly addressed the issue have concluded that the amendment is enforceable under § 1983 by health care providers. See *AMISUB (PSL), Inc.* v. *Colorado Dept. of Social Services*, 879 F. 2d 789, 793 (CA10 1989); *West Virginia University Hospitals, Inc.* v. *Casey*, 885 F. 2d 11, 17–22 (CA3 1989), cert. granted, 494 U. S. 1003 (1990); *Coos Bay Care Center*, 803 F. 2d, at 1061–1063; *Nebraska Health Care Assn., Inc.* v. *Dunning*, 778 F. 2d 1291, 1295–1297 (CA8 1985), cert. denied, 479 U. S. 1063 (1987). Other courts have entertained such claims without separately considering whether the providers had a cause of action under § 1983. See *Hoodkroft Convalescent Center, Inc.* v. *New Hampshire Division of Human Services*, 879 F. 2d 968, 972–975 (CA1 1989), cert. denied, 493 U. S. 1020 (1990); *Colorado Health Care Assn.* v. *Colorado Dept. of Social Services*, 842 F. 2d 1158, 1165 (CA10 1988); *Hillhaven Corp.* v. *Wisconsin Dept. of Health and Social Services*, 733 F. 2d 1224, 1225–1226 (CA7 1984); *Alabama Hospital Assn.* v. *Beasley*, 702 F. 2d 955, 955–962 (CA11 1983); *Mississippi Hospital Assn., Inc.* v. *Heckler*, 701 F. 2d 511, 517–520 (CA5 1983); *Charleston Memorial Hospital* v. *Conrad*, 693 F. 2d 324, 326 (CA4 1982); *Washington Health Facilities Assn.* v. *Washington Dept. of Social and Health Services*, 698 F. 2d 964, 965 (CA9 1982).

of "findings" and "assurances," Congress intended to deprive health care providers of their right to challenge rates under § 1983. Instead, as the legislative history shows, the requirements of "findings" and "assurances" prescribe the respective roles of a State and the Secretary and do not, as petitioners suggest, eliminate a State's obligation to adopt reasonable rates.

Nevertheless, petitioners argue that because the Boren Amendment gives a State flexibility to adopt any rates it finds are reasonable and adequate, the obligation imposed by the amendment is too "vague and amorphous" to be judicially enforceable. We reject this argument. As in *Wright*, the statute and regulation set out factors which a State must consider in adopting its rates.[17] In addition, the statute requires the State, in making its findings, to judge the reasonableness of its rates against the objective benchmark of an "efficiently and economically operated facilit[y]" providing care in compliance with federal and state standards while at the same time ensuring "reasonable access" to eligible participants. That the amendment gives the States substantial discretion in choosing among reasonable methods of calculating rates may affect the standard under which a court reviews whether the rates comply with the amendment, but it does not render the amendment unenforceable by a court. While

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[17] For example, when determining methods for calculating rates that are reasonably related to the costs of an efficient hospital, a State must consider: (1) the unique situation (financial and otherwise) of a hospital that serves a disproportionate number of low income patients, (2) the statutory requirements for adequate care in a nursing home, and (3) the special situation of hospitals providing inpatient care when long-term care at a nursing home would be sufficient but is unavailable. 42 U. S. C. § 1396a(a)(13)(A) (1982 ed., Supp. V). The Boren Amendment provides, if anything, more guidance than the provision at issue in *Wright*, which vested in the housing authority substantial discretion for setting utility allowances. See *Wright* v. *Roanoke Redevelopment and Housing Authority*, 479 U. S. 418, 437 (1987) (O'CONNOR, J., dissenting) (citing 24 CFR § 965.476(d) (1986)).

there may be a range of reasonable rates, there certainly are *some* rates outside that range that no State could ever find to be reasonable and adequate under the Act.[18] Although some knowledge of the hospital industry might be required to evaluate a State's findings with respect to the reasonableness of its rates, such an inquiry is well within the competence of the Judiciary.

B

Petitioners also argue that Congress has foreclosed enforcement of the Medicaid Act under § 1983. We find little merit in this argument. "'We do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy' for the deprivation of a federally secured right." *Wright*, 479 U. S., at 423–424 (quoting *Smith* v. *Robinson*, 468 U. S. 992, 1012 (1984)). The burden is on the State to show "by express provision or other specific evidence from the statute

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[18] For example, in *AMISUB*, *supra*, at 796, the court invalidated the Colorado plan because the State had not made any findings that its rates were "reasonable and adequate" and because the State conceded that the adoption of its "Budget Adjustment Factor" which divided the median cost of care in half had absolutely no relevance to the costs of an efficient hospital. See also *Casey*, *supra*, at 22–23 (invalidating Pennsylvania plan because it provided no justification for treating out-of-state hospitals differently than in-state hospitals), cert. granted, 494 U. S. 1003 (1990). If a State errs in finding that its rates are reasonable and adequate, or in supplying assurances to that effect to the Secretary, then a provider is entitled to have the court invalidate the current state plan and order the State to promulgate a new plan that complies with the Act. We note that the Courts of Appeals generally agree that when the State has complied with the procedural requirements imposed by the amendment and regulations, a federal court employs a deferential standard of review to evaluate whether the rates comply with the substantive requirements of the amendment. See, *e. g.*, *AMISUB*, *supra*, at 795–801; *Casey*, *supra*, at 23–24; *Dunning*, *supra*, at 1294; *Wisconsin Hospital Assn.* v. *Reivitz*, 733 F. 2d 1226, 1232–1233 (CA7 1984); *Mississippi Hospital Assn.*, *supra*, at 516. We express no opinion as to which of the cases contains the correct articulation of the appropriate standard of review.

itself that Congress intended to foreclose such private enforcement." *Wright*, *supra*, at 423. Petitioners concede that the Act does not expressly preclude resort to § 1983. In the absence of such an express provision, we have found private enforcement foreclosed only when the statute itself creates a remedial scheme that is "sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under § 1983." *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1, 20 (1981).

On only two occasions have we found a remedial scheme established by Congress sufficient to displace the remedy provided in § 1983. In *Sea Clammers*, *supra*, we held that the comprehensive enforcement scheme found in the the Federal Water Pollution Control Act, 33 U. S. C. § 1251 *et seq.*— which granted the Environmental Protection Agency considerable enforcement power through the use of noncompliance orders, civil suits, and criminal penalties, and which included two citizen-suit provisions—evidenced a congressional intent to foreclose reliance on § 1983. See 453 U. S., at 13. Similarly in *Smith* v. *Robinson*, *supra*, at 1010–1011, we held that the elaborate administrative scheme set forth in the Education of the Handicapped Act (EHA), 20 U. S. C. § 1400 *et seq.*, manifested Congress' desire to foreclose private reliance on § 1983 as a remedy. The EHA contained a "carefully tailored administrative and judicial mechanism," 468 U. S., at 1009, that included local administrative review and culminated in a right to judicial review. *Id.*, at 1011 (citing 20 U. S. C. §§ 1412(4), 1414(a)(5), 1415).

The Medicaid Act contains no comparable provision for private judicial or administrative enforcement. Instead, the Act authorizes the Secretary to withhold approval of plans, 42 U. S. C. § 1316(a) (1982 ed. and Supp. V), or to curtail federal funds to States whose plans are not in compliance with the Act. 42 U. S. C. § 1396c (1982 ed.). In addition, the

Act requires States to adopt a procedure for postpayment claims review to "ensure the proper and efficient payment of claims and management of the program." 42 U. S. C. § 1396a (a)(37) (1982 ed.). By regulation, the States are required to adopt an appeals procedure by which individual providers may obtain administrative review of reimbursement rates. 42 CFR § 447.253(c) (1989). The Commonwealth of Virginia has adopted a three-tiered administrative scheme within the state Medicaid agency to comply with these regulations. App. 32–43.

This administrative scheme cannot be considered sufficiently comprehensive to demonstrate a congressional intent to withdraw the private remedy of § 1983. In *Wright*, we concluded that the "generalized powers" of the Department of Housing and Urban Development (HUD) to audit and cut off federal funds were insufficient to foreclose reliance on § 1983 to vindicate federal rights. 479 U. S., at 428. We noted that HUD did not exercise its auditing power frequently, and the statute did not require, nor did HUD provide, any mechanism for individuals to bring problems to the attention of HUD. *Ibid.*; see also *Rosado*, 397 U. S., at 420–423. Such a conclusion is even more appropriate in the context of the Medicaid Act, since as explained above, see *supra*, at 515–518, a primary purpose of the Boren Amendment was to reduce the role of the Secretary in determining methods for calculating payment rates. It follows that the Secretary's limited oversight is insufficient to demonstrate an intent to foreclose relief altogether in the courts under § 1983.[19]

[19] Indeed, this conclusion is even more apt given that Congress believed that a private judicial remedy existed before the passage of the Boren Amendment, see *supra*, at 516–518, when the administrative oversight scheme was more elaborate than it is today.

For the same reasons, we reject the argument that the availability of an action against the Secretary under the APA forecloses § 1983 as a remedy. Putting aside the question whether an APA remedy is available, see n. 12, *supra*, there is absolutely no indication that Congress intended such an ac-

We also reject petitioners' argument that the existence of administrative procedures whereby health care providers can obtain review of individual claims for payment evidences an intent to foreclose a private remedy in the federal courts. The availability of state administrative procedures ordinarily does not foreclose resort to § 1983. See *Patsy* v. *Board of Regents of Fla.*, 457 U. S. 496, 516 (1982). Nor do we find any indication that Congress specifically intended that this administrative procedure replace private remedies available under § 1983. The regulations allow States to limit the issues that may be raised in the administrative proceeding. 42 CFR § 447.253(c) (1989). Most States, including Virginia, do not allow health care providers to challenge the overall method by which rates are determined.[20] See Brief for American Health Care Association et al. as *Amici Curiae* 20–24, and App. A and B. Such limited state administrative procedures cannot be considered a "comprehensive" scheme that manifests a congressional intent to foreclose reliance on § 1983. See *Wright*, 479 U. S., at 429 (availability of grievance procedure did not prevent resort to § 1983). Thus, we conclude that Congress did not foreclose a private judicial remedy under § 1983.

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tion to be the sole method for health care providers to enforce the reimbursement provision. Moreover, given that Congress believed that a private cause of action existed prior to the passage of the Boren Amendment and that the amendment reduced the Secretary's oversight role, it is implausible to infer that Congress intended to replace the private judicial remedy under § 1983 with a proceeding for judicial review under the APA.

[20] The Virginia procedure allows providers to dispute individual payments. It excludes from appeal the following issues: (1) the organization of the peer groups; (2) the use of the reimbursement rates established in the plan; (3) the calculation of the initial group ceilings as of 1982; (4) the use of the consumer price index; and (5) the time limits set forth in the state plan. *Ibid.*

Finally, we reject petitioners' argument that the availability of judicial review under the Virginia Administrative Procedure Act is relevant to the question whether relief is available under § 1983. See *Wright*, 479 U. S., at 429. See generally *Monroe* v. *Pape*, 365 U. S. 167, 183 (1961).

III

The Boren Amendment to the Act creates a right, enforceable in a private cause of action pursuant to § 1983, to have the State adopt rates that it finds are reasonable and adequate rates to meet the costs of an efficient and economical health care provider. The judgment of the Court of Appeals is accordingly

Affirmed.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR, JUSTICE SCALIA, and JUSTICE KENNEDY join, dissenting.

The relevant portion of the Boren Amendment requires States to reimburse Medicaid services providers using

> "rates (determined in accordance with methods and standards developed by the State . . .) which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities . . . ." 42 U. S. C. § 1396a(a)(13)(A) (1982 ed., Supp. V).

The Court notes in its opinion, *ante*, at 504, that respondent seeks permanent relief under § 1983 in the form of court-ordered reimbursement at new rates. Respondent also seeks, as interim relief, reimbursement at rates commensurate with payments under the Medicare program. Complaint ¶¶ 34–39; see App. 22. And though respondent's prayer for relief is only one example of a good claim for relief under today's decision, every § 1983 action hereafter brought by providers to enforce § 1396a(a)(13)(A) will inevitably seek the substitution of a rate system preferred by the provider for the rate system chosen by the State. Thus, whenever a provider prevails in such an action, the defendant State will be enjoined to implement a system of rates other than the rates "determined in accordance with methods and standards

developed by the State," which the "State finds . . . are reasonable and adequate," and with respect to which the State made assurances to the Secretary that the Secretary found "satisfactory." See § 1396a(a)(13)(A). The court orders entered in such actions therefore will require the States to adopt reimbursement rate systems different from those Congress expressly required them to adopt by the above-quoted language.

The Court reasons that the policy underlying the Boren Amendment would be thwarted if judicial review under § 1983 were unavailable to challenge the reasonableness and adequacy of rates established by States for reimbursing Medicaid services providers. This sort of reasoning, however, has not hitherto been thought an adequate basis for deciding that Congress conferred an enforceable right on a party.

Before *Maine* v. *Thiboutot*, 448 U. S. 1 (1980), a plaintiff seeking to judicially enforce a provision in a federal statute was required to demonstrate that the statute contained an implied cause of action. Satisfaction of the now familiar standards from, *e. g.*, *Cort* v. *Ash*, 422 U. S. 66 (1975), was the means for making the requisite showing. The Court's general practice was "to imply a cause of action where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case." *Cannon* v. *University of Chicago*, 441 U. S. 677, 690, n. 13 (1979). It was thus crucial to a demonstration of the existence of an implied action for the statute to contain a right "in favor of" the particular plaintiff. See, *Cort*, 422 U. S., at 78 ("First, . . . does the statute create a federal right in favor of the plaintiff?"). The plaintiff then would have to satisfy three additional standards to establish that the statute contained an implied judicial remedy for vindicating that right. See *ibid.* In *Maine* v. *Thiboutot*, the Court essentially removed the burden of making the latter three showings by holding that § 1983 generally (with an exception subsequently

developed in *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1 (1981)) supplies the remedy for vindication of rights arising from federal statutes.

But while the Court's holding in *Thiboutot* rendered obsolete some of the case law pertaining to implied rights of action, a significant area of overlap remained. For relief to be had either under § 1983 or by implication under *Cort* v. *Ash*, *supra*, the language used by Congress must confer identifiable enforceable rights. See *Wright* v. *Roanoke Redevelopment and Housing Authority*, 479 U. S. 418, 432–433 (1987) (O'CONNOR, J., dissenting) ("Whether a federal statute confers substantive rights is not an issue unique to § 1983 actions. In implied right of action cases, the Court also has asked, since *Cort* v. *Ash*, 422 U. S. 66, 78 (1975), whether 'the statute create[s] a federal right in favor of the plaintiff'"). In this regard, the Court in *Wright* said that a § 1983 action does not lie where Congress did not intend for the statutory provision "to rise to the level of an enforceable right." *Id.*, at 423 (citing *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 19 (1981)).

In *Cannon*, *supra*, the Court said that "the right- or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action." *Id.*, at 690, n. 13. This statement is suggestive of the traditional rule that the first step in our exposition of a statute always is to look to the statute's text and to stop there if the text fully reveals its meaning. See, *e. g.*, *American Tobacco Co.* v. *Patterson*, 456 U. S. 63, 68 (1982) ("'[O]ur starting point must be the language employed by Congress,' and we assume 'that the legislative purpose is expressed by the ordinary meaning of the words used'") (internal citations omitted). There is no apparent reason to deviate from this sound rule when the question is whether a federal statute confers substantive rights on a § 1983 plain-

tiff. Yet the Court virtually ignores the relevant text of the Medicaid statute in this case.

The Medicaid statute provides for appropriations of federal funds to States that submit, and have approved by the Secretary of Health and Human Services, "State plans for medical assistance." 42 U. S. C. § 1396 (1982 ed., Supp. V). The next provision in the statute specifies requirements for the contents of state medical assistance plans. § 1396a(a). The provision at issue here, § 1396a(a)(13)(A), is simply a part of the thirteenth listed requirement for such plans. In light of the placement of § 1396a(a)(13)(A) within the structure of the statute, see *Pennhurst*, *supra*, at 19 (emphasizing the statutory "context" of the provision under review), one most reasonably would conclude that § 1396a(a)(13)(A) is addressed to the States and merely establishes one of many conditions for receiving federal Medicaid funds; the text does not clearly confer any substantive rights on Medicaid services providers. This structural evidence is buttressed by the absence in the statute of any express "focus" on providers as a beneficiary class of the provision. See *Wright*, *supra*, at 430 (finding a provision in the statute "focusing" on the plaintiff class dispositive evidence of Congress' intent in the Brooke Amendment to create rights in favor of the plaintiff class).

Even if one were to assume that the terms of § 1396a(a)(13)(A) confer a substantive right on providers in the nature of a guarantee of "reasonable and adequate" rates, the statute places its own limitation on that right in very plain language. Section 1396a(a)(13)(A) establishes a procedure for establishing such rates of reimbursement. The first step requires the States to make certain findings. The second and only other step requires the States to make certain assurances to the Secretary and the Secretary—not the courts—to review those assurances. Under the logic of our case law, respondent arguably may bring a § 1983 action to require that rates be set according to that process. Indeed, establish-

ment of rates in accordance with that process is the only discernible right accruing to anyone under § 1396a(a)(13)(A). But as this case illustrates, Medicaid providers bring § 1983 actions to *avoid* the process rather than to seek its implementation. The Court approves such challenges despite the fact that a plaintiff's success in such a suit results in the displacement of rates created in accordance with the statutory process by rates established pursuant to court order. To support its decision, the Court looks beyond the unambiguous terms of the statute and relies on policy considerations purportedly derived from legislative history and superseded versions of the statute. See *ante*, at 515–520.

The Court concludes, *ante*, at 519, that the contrary position equates with the proposition that the States are not obligated to adopt reasonable rates. Indeed, the theme of much of the Court's argument is that without judicial enforceability, the States cannot be trusted to implement § 1396a(a)(13)(A)'s command of creating rate systems that are reasonable and adequate. The Court states at one point that "[i]t would make little sense for Congress to require a State to make findings without requiring those findings to be correct. . . . We decline to adopt an interpretation of the Boren Amendment that would render it a dead letter." *Ante*, at 514.

The interpretation to which the Court refers, however, would scarcely render the Boren Amendment a "dead letter." It is, instead, the Court's own reading that nullifies the "letter" of the amendment. Apart from its displacement of the statutory ratesetting process noted previously, the Court's suggestion that the States would deliberately disregard the requirements of the statute ignores the Secretary's oversight incorporated into the statute and does less than justice to the States. The Court itself recognizes that the basic purpose of the Boren Amendment was to allow the States more latitude in establishing Medicaid reimbursement rates. In light of that fact, the Court's interpretation takes far more liberties

with the statutory language than does the position advanced by petitioners. I would reverse the judgment of the Court of Appeals.

GENERAL MOTORS CORP. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 89–369. Argued March 21, 1990—Decided June 14, 1990

The Clean Air Act was amended in 1970 to deal with a perceived national air-pollution emergency. The amendments required that the Administrator of the Environmental Protection Agency (EPA) promulgate national ambient air quality standards (NAAQS) within 30 days and that each State thereafter submit a state implementation plan (SIP) within nine months. Section 110(a)(2) of the Act required the Administrator to approve a SIP within four months of its submission if the SIP met various substantive requirements. Section 110(a)(3) authorizes a State to propose a SIP revision and requires the Administrator to approve that revision if he determines, among other things, that it "meets the requirements of [§ 110(a)(2)]." In 1980, EPA approved Massachusetts' proposed SIP governing certain emissions from automobile-painting operations. The SIP permitted petitioner General Motors Corporation (GMC)—whose automobile plant's painting operation is a source of ozone—to meet emissions limits in stages, but required full compliance by December 31, 1985. In June 1985, GMC sought an extension of that deadline until summer 1987. Massachusetts approved the revision and submitted it to EPA on the day before the existing SIP's deadline, but EPA did not reject it until September 1988. In the meantime, EPA sent GMC a notice of violation of the existing SIP, and the Government filed an enforcement action in the District Court. In May 1988, the District Court entered summary judgment for GMC, holding that § 110(a)(3) imposed a 4-month time limit on EPA review of a SIP revision, and that EPA was therefore barred from enforcing the existing SIP from the end of the 4-month period until it finally acted on the revision. Although agreeing that the Act imposed a 4-month deadline, the Court of Appeals reversed, concluding that the failure to meet that deadline did not preclude EPA from enforcing the existing SIP.

Held:

1. EPA is not required to act on a proposed SIP revision within four months. Since § 110(a)(2)'s 4-month requirement was enacted as one of a series of deadlines designed to assure quick implementation of pollution-control requirements, that section refers only to the action required on the original SIP and not to a revision. Moreover, in the absence of an express requirement that the Administrator process a proposed revision within four months, this Court is not free to read such a

limitation into § 110(a)(3). That section incorporates only the substantive, but not the procedural, requirements of § 110(a)(2). Nor does § 110(g)—which authorizes a State Governor, in certain circumstances, temporarily to suspend a SIP for which the State has submitted a proposed revision when the Administrator has not taken action "within the required four month period"—impose a 4-month limitation on EPA. That section does not *require* the Administrator to do anything, and its incorporation of the mistaken *presupposition* that some "four month period" is "required" does not impose a general requirement on EPA. Pp. 536–539.

2. Although subject to the Administrative Procedure Act's requirement that agencies conclude matters "within a reasonable time," EPA is not barred from bringing suit to enforce an existing SIP if it unreasonably delays action on a proposed revision. This Court will not infer an enforcement bar in the absence of a specific provision in the Clean Air Act suggesting that Congress intended to create one. In fact, that Act plainly states that EPA may bring an enforcement action whenever a person is in violation of any "applicable implementation plan" requirement, § 113(b)(2), and there is little doubt that the existing SIP remains the "applicable implementation plan" even after the State has submitted a proposed revision. See, *e. g.*, *Train* v. *Natural Resources Defense Council, Inc.*, 421 U. S. 60, 92. It is significant that Congress explicitly enacted an enforcement bar elsewhere in the Act, see § 113(d)(10), but failed to do so in the section at issue, and that it provided other, less drastic, remedies when EPA delays action on a SIP revision, see §§ 304 (a)(2), 113(b). Pp. 539–542.

876 F. 2d 1060, affirmed.

BLACKMUN, J., delivered the opinion for a unanimous Court.

Theodore L. Garrett argued the cause for petitioner. With him on the briefs were *Sonya D. Winner*, *Harry J. Pearce*, *James C. Cubbin*, and *Patrick J. McCarroll*.

Deputy Solicitor General Wallace argued the cause for the United States. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Stewart*, *Clifford M. Sloan*, *Martin W. Matzen*, and *David C. Shilton*.*

**Roland T. Huson III* and *Ann C. Coco* filed a brief for the Department of Environmental Quality of Louisiana as *amicus curiae* urging reversal.

A brief of *amici curiae* urging affirmance was filed for the Commonwealth of Massachusetts et al. by *James M. Shannon*, Attorney General of Massachusetts, and *James R. Milkey*, Assistant Attorney General, and by

JUSTICE BLACKMUN delivered the opinion of the Court.

This case concerns a Clean Air Act enforcement action by the Environmental Protection Agency (EPA) against petitioner General Motors Corporation (GMC). We are asked to decide whether the 4-month time limit on EPA review of an original state implementation plan (SIP) also applies to its review of a SIP revision, and whether, if EPA fails to complete its review of a SIP revision in a timely manner, EPA is prevented from enforcing an existing SIP.

I

What is known as the Clean Air Act, 77 Stat. 392, became law on December 17, 1963. Twenty years ago, Congress enacted the Clean Air Amendments of 1970, 84 Stat. 1676, a comprehensive national program that made the States and the Federal Government partners in the struggle against air pollution. The threats to human health were regarded as urgent, and the 1970 Amendments were designed to result in the expeditious establishment of programs to deal with the problem. The amendments specified a detailed timetable for

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the Attorneys General for their respective States as follows: *John K. Van de Kamp* of California, *Clarine Nardi Riddle* of Connecticut, *Jim Jones* of Idaho, *Neil F. Hartigan* of Illinois, *Robert T. Stephan* of Kansas, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *Robert Abrams* of New York, *Lacy H. Thornburg* of North Carolina, *Jeffrey Amestoy* of Vermont, *Mary Sue Terry* of Virginia, and *Kenneth Eikenberry* of Washington.

Briefs of *amici curiae* were filed for the Chamber of Commerce of the United States by *Robin S. Conrad;* for Golden West Refining Co. et al. by *Lawrence J. Straw, Jr.*, and *Kenneth A. Manaster;* for the Mid-America Legal Foundation by *Martha A. Churchill* and *James T. Harrington;* for the Motor Vehicle Manufacturers Association et al. by *Francis S. Blake, Jerome C. Muys, Jr., William H. Crabtree, G. William Frick*, and *Henry V. Nickel;* for the National Governors' Association et al. by *Benna Ruth Solomon, Joyce Holmes Benjamin*, and *Beate Bloch;* for the Service Station Dealers of America by *Dimitri G. Daskalopoulos;* and for the Washington Legal Foundation by *Daniel J. Popeo, Paul D. Kamenar, Robert H. Lamb*, and *Robert S. Smith.*

federal and state action to accomplish this objective. They required the EPA Administrator, within 30 days of the passage of the amendments, to promulgate national ambient air quality standards (NAAQS). § 109(a)(1), 42 U. S. C. § 7409(a)(1) (1982 ed.). Within nine months thereafter, each State was to submit a SIP to implement, maintain, and enforce the NAAQS. § 110(a)(1), 42 U. S. C. § 7410(a)(1) (1982 ed.). As the final step in this start-up phase of the program, EPA was to act on a proposed SIP within four months: "The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or any portion thereof." § 110(a)(2), as amended, 42 U. S. C. § 7410(a)(2) (1982 ed.). The Administrator was directed to approve the SIP if he determined that it was adopted after reasonable notice and hearing and that it met various substantive requirements, including emissions limitations, devices for monitoring air-quality data, and enforcement mechanisms.

The integrated timetable established by the 1970 amendments reflected the urgency of establishing air-pollution controls. But the amendments also recognized that local needs and control strategies could evolve over time and that SIP's would have to change as well. The States therefore were authorized to propose SIP revisions, and the EPA Administrator was directed to approve any such proposed revision "if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings." § 110(a)(3), 42 U. S. C. § 7410(a)(3)(A) (1982 ed.).

The 1970 amendments also specified certain enforcement mechanisms. The Act empowered EPA to order compliance with an applicable implementation plan, § 113(a), 42 U. S. C. § 7413(a) (1982 ed.), and to seek injunctive relief against a source violating the plan or an EPA order, § 113(b), as amended, 42 U. S. C. § 7413(b) (1982 ed.). In addition, Congress prescribed criminal penalties for knowing violations of

plans and orders, § 113(c), 42 U. S. C. § 7413(c) (1982 ed.), and authorized citizen suits for injunctions against violators, in the absence of Government enforcement, § 304, as amended, 42 U. S. C. § 7604 (1982 ed.).

Congress further amended the Clean Air Act by the Clean Air Act Amendments of 1977. 91 Stat. 685. It added to the Act the concept of a "nonattainment area"—an area where air quality falls short of the NAAQS. § 171(2), 42 U. S. C. § 7501(2) (1982 ed.). The deadline for attainment of the primary NAAQS in a nonattainment area was December 31, 1982. § 172(a)(1), 42 U. S. C. § 7502(a)(1) (1982 ed.). Further extensions were permitted for "photochemical oxidants" (ozone) or carbon monoxide, but only if the State demonstrated that attainment was not possible before 1983 "despite the implementation of all reasonably available measures" and that attainment would be achieved "as expeditiously as practicable, but not later than December 31, 1987." § 172(a)(2), 42 U. S. C. § 7502(a)(2) (1982 ed.).

II

A

The entire Commonwealth of Massachusetts is a nonattainment area for NAAQS with respect to ozone. See 40 CFR § 81.322, p. 126 (1989). Petitioner GMC owns and operates an automobile assembly plant in Framingham, Mass. The plant's painting operation is a source of volatile organic compounds that contribute to ozone. In 1980, EPA approved Massachusetts' proposed nonattainment area SIP governing volatile organic compound emissions from automobile-painting operations. The SIP permitted GMC to meet emissions limits in stages, but required full compliance by December 31, 1985. In 1981, EPA published a policy statement suggesting that new technology in automobile-painting operations might justify deferral of industry compliance until 1986 or 1987. 46 Fed. Reg. 51386. Three years later, in November 1984, GMC sought an extension from the

December 31, 1985, compliance date imposed by the existing SIP, not for the new technology, but rather for additional time to install emission controls on its existing lines. App. 38. In June 1985, GMC proposed converting to the new technology and requested a summer 1987 deadline. *Id.*, at 41. The Commonwealth approved the revision and submitted the proposal to EPA on December 30, 1985, one day before the existing SIP compliance deadline. *Id.*, at 50.

GMC began construction of a new painting facility but continued to operate its existing plant. On August 14, 1986, EPA sent GMC a notice of violation informing GMC that it was in violation of the applicable SIP. *Id.*, at 75. Approximately one year later, on August 17, 1987, the Government filed an enforcement action under § 113(b) of the Act, 42 U. S. C. § 7413(b) (1982 ed.), alleging violations of the existing SIP's 1985 deadline. On September 4, 1988, the agency made its final decision to reject the revision. 53 Fed. Reg. 36011.

B

The District Court construed § 110(a)(3) as imposing a 4-month time limit on EPA review of a SIP revision, App. 123–124, and concluded that when EPA failed to complete its review within four months, it was barred from enforcing the existing SIP during the interval between the end of the 4-month period and the time EPA finally acted on the revision, *id.*, at 125. Because EPA had not issued a notice of noncompliance until well after the 4-month period had elapsed and, at the time of the court's ruling, had yet to make a final decision on the Commonwealth's SIP revision, summary judgment was entered for GMC.

The Court of Appeals for the First Circuit reversed that judgment and remanded the case for further proceedings. 876 F. 2d 1060 (1989). The Court of Appeals agreed with the District Court that the Act imposed a 4-month deadline on EPA review of a SIP revision, but concluded that the failure

to meet that deadline did not preclude EPA from enforcing the existing SIP.

Reasoning that an enforcement bar was too drastic a remedy for agency delay, the court concluded that the appropriate remedies for agency inaction were those provided by the Act itself: a suit to compel agency action under § 304(a)(2), 42 U. S. C. § 7604(a)(2) (1982 ed.), or a request pursuant to § 113(b), 42 U. S. C. § 7413(b) (1982 ed.), for reduction or elimination of penalties during the period in which unreasonable agency delay resulted in prejudice. 876 F. 2d, at 1067–1068. We granted certiorari because of a disagreement among the Circuits as to whether EPA is barred from enforcing an existing SIP if the agency fails to take action on a proposed SIP revision within four months.[1] 493 U. S. 991 (1989).

III

To assure that some form of pollution-control requirements were put in place quickly, the 1970 Amendments established a series of deadlines. One of these was the requirement that EPA act on a proposed SIP within four months after the State submits its plan. § 110(a)(2), 42 U. S. C. § 7410(a)(2) (1982 ed.). Specifically, the provision requires EPA to act within "four months after the date required for submission of a plan." This seems to us to refer only to the action required on the original SIP. Section 110(a)(2), by its terms, therefore does not impose such a time restraint on EPA review of a SIP *revision*.

Petitioner nevertheless claims that § 110(a)(3) requires EPA to act on a proposed SIP revision within four months. That provision requires the Administrator to approve "any revision of an implementation plan . . . if he determines that it meets the requirements of paragraph (2) [§ 110(a)(2)] and has been adopted by the State after reasonable notice and

[1] See, *e. g.*, *American Cyanamid Co.* v. *EPA*, 810 F. 2d 493 (CA5 1987); *Duquesne Light Co.* v. *EPA*, 225 U. S. App. D. C. 290, 698 F. 2d 456 (1983).

public hearings." Petitioner contends that the reference to § 110(a)(2) was intended to incorporate both the substantive and the procedural requirements of that provision. Brief for Petitioner 13.

We are not persuaded. The Administrator is to approve the proposed revision if he determines that "it"—that is, the revision—meets the substantive requirements imposed on a SIP by § 110(a)(2). There is no requirement that "he"—that is, the Administrator—meet the deadline of that section. Petitioner's reading, moreover, makes nonsense of the further requirement in § 110(a)(3) that the Administrator find that the proposed revision "has been adopted by the State after reasonable notice and public hearings." If, as petitioner contends, § 110(a)(3) incorporates the procedural provisions of § 110(a)(2), it surely incorporates § 110(a)(2)'s requirement that the Administrator find that the SIP was adopted after reasonable notice and hearing. The separate mention in § 110(a)(3) of the notice and hearing requirement demonstrates that it does not simply incorporate every direction of § 110(a)(2); and since § 110(a)(3) does not separately require the Administrator to process a proposed revision within four months, we are not free to read that limitation into the statute.

This suffices to dispose of petitioner's contention, but if additional support is needed, it is available. The statute elsewhere explicitly imposes upon the Administrator deadlines of the kind that petitioner would insert into § 110(a)(3). Indeed, the very next provision of the Act contains just such an express time restraint on EPA approval of a SIP revision. See § 110(a)(3)(B) (with respect to certain SIP revisions for fuel-burning stationary sources, "[t]he Administrator shall approve or disapprove any revision no later than three months after its submission"). For other examples of explicit deadlines in the Clean Air Act, see § 110(c)(1) (6-month deadline for imposition of federal implementation "plan (or revision thereof)"); § 113(d)(2) (90-day deadline for review of

state-issued delayed compliance order). Since the statutory language does not expressly impose a 4-month deadline and Congress expressly included other deadlines in the statute, it seems likely that Congress acted intentionally in omitting the 4-month deadline in § 110(a)(3)(A). See *Russello* v. *United States*, 464 U. S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion,'" quoting *United States* v. *Wong Kim Bo*, 472 F. 2d 720, 722 (CA5 1972)).

Petitioner's final contention is that § 110(g) imposes a 4-month limitation on EPA's action on a proposed SIP revision. That section provides:

> "(1) In the case of any State which has adopted and submitted to the Administrator a proposed plan revision which the State determines—
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> "(A) meets the requirements of this section, and
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> "(B) is necessary (i) to prevent the closing for one year or more of any source of air pollution, and (ii) to prevent substantial increases in unemployment which would result from such closing, and which the Administrator has not approved or disapproved under this section *within the required four month period*, the Governor may issue a temporary emergency suspension of the part of the applicable implementation plan for such State which is proposed to be revised with respect to such source. . . .
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> "(2) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months . . . ." (Emphasis added.)

According to petitioner, § 110(g) on its own terms "require[s]" the Administrator to process a proposed revision within a "four month period." Reply Brief for Petitioner 7.

This is petitioner's strongest claim, but we are constrained to reject it. Section 110(g) does not, by its terms, *require*

the Administrator to take any action. It merely authorizes the Governor to suspend the existing SIP if certain action has occurred. True, it *presupposes* that some "four month period" is "required," but the incorporation of that mistaken presupposition does not, of itself, create a general requirement that the Administrator process all proposed revisions within four months.[2] Whatever may be the correct interpretation of § 110(g)'s "required four month period," we do not think this passing mention can be inflated into a requirement that the Administrator process each and every proposed revision within four months.

IV

Although the 4-month deadline does not apply, EPA remains subject to the Administrative Procedure Act's (APA's) statutory requirements of timeliness. The APA requires agencies to conclude matters "within a reasonable time," 5 U. S. C. § 555(b), and provides a remedy for agency action "unreasonably delayed," 5 U. S. C. § 706(1). The Government concedes, as we think it must, that its action on a proposed SIP revision is subject to that mandate. Brief for United States 19–20.

Petitioner's main claim is that any delay over four months is categorically unreasonable because it violates EPA's statu-

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[2] Even supposing, moreover, that § 110(g) does create some new requirement, it is not at all clear that the requirement is a general obligation on the part of the Administrator to process every proposed revision within four months. That section says only that the Governor may suspend the SIP if the State has submitted a proposed revision which, among other things, "the Administrator has not approved or disapproved under this section within the required four month period." The "required four month period" simply could impose a waiting period on the Governor; before he suspends the existing SIP, he must give the Administrator four months to consider the proposed revision. The Administrator is not always obliged to process a proposed revision within four months, although he may be constrained to act on certain proposals in that period if he wants to prevent the Governor from exercising his prerogative under § 110(g).

tory duty to process a revision within that period. We have rejected that claim above, but we nevertheless must consider petitioner's alternative contention that EPA may not bring an action to enforce an existing SIP if it unreasonably delays in acting on the proposed revision. Without deciding whether the delay in this case was unreasonable, we now address this claim. Because the statute does not reveal any congressional intent to bar enforcement of an existing SIP if EPA delays unreasonably in acting on a proposed SIP revision, we agree with the Court of Appeals that such an enforcement action is not barred.

The language of the Clean Air Act plainly states that EPA may bring an action for penalties or injunctive relief whenever a person is in violation of any requirement of an "applicable implementation plan." § 113(b)(2), 42 U. S. C. § 7413(b)(2) (1982 ed.). There can be little or no doubt that the existing SIP remains the "applicable implementation plan" even after the State has submitted a proposed revision. The statute states: "For purposes of this chapter, an applicable implementation plan is the implementation plan, or most recent revision thereof, which has been approved under [§ 110(a), 42 U. S. C. § 7410(a) (1982 ed.),] or promulgated under [110(c), 42 U. S. C. § 7410(c) (1982 ed.),] and which implements the requirements of this section." § 110(d), 42 U. S. C. § 7410(d) (1982 ed.). Both this Court and the Courts of Appeals have recognized that the approved SIP is the applicable implementation plan during the time a SIP revision proposal is pending. See, *e. g.*, *Train* v. *Natural Resources Defense Council, Inc.*, 421 U. S. 60, 92 (1975); *United States* v. *Alcan Foil Products Division of Alcan Aluminum Corp.*, 889 F. 2d 1513, 1519 (CA6 1989), cert. pending, No. 89–1104; *United States* v. *Wheeling-Pittsburgh Steel Corp.*, 818 F. 2d 1077, 1084 (CA3 1987); *Duquesne Light Co.* v. *EPA*, 225 U. S. App. D. C. 290, 305, 698 F. 2d 456, 471 (1983). The commentators agree with this conclusion. See D. Currie, Air Pollution: Federal Law and Analysis § 8.07,

n. 14 (Supp. 1990); 1 W. Rodgers, Environmental Law: Air and Water § 3.39(c) (1986 and Supp. 1988).

There is nothing in the statute that limits EPA's authority to enforce the "applicable implementation plan" solely to those cases where EPA has not unreasonably delayed action on a proposed SIP revision. Moreover, we find it significant that Congress expressly enacted an enforcement bar elsewhere in the statute. See § 113(d)(10); 42 U. S. C. § 7413(d)(10) (1982 ed.) ("During the period of the order . . . no Federal enforcement action pursuant to this section and no action under section 304 of this Act shall be pursued against such owner. . . ."). The fact that Congress explicitly enacted an enforcement bar similar to the one proposed by petitioner in one section of the statute, but failed to do so in the section at issue in this case reinforces our refusal to import such a bar here. See *Russello* v. *United States*, 464 U. S., at 23.[3]

We note that other statutory remedies are available when EPA delays action on a SIP revision.[4] Although these statutory remedies may not appear to be so strong a deterrent to EPA delay as would an enforcement bar, these are the remedies that Congress has provided in the statute.[5] Cf. *Brock*

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[3] Our conclusion is further supported by the language of § 110(g), 42 U. S. C. § 7410(g) (1982 ed.), discussed above. Section 110(g) grants certain authority to a State's Governor to suspend the existing SIP after four months. As the Court of Appeals discerned, 876 F. 2d 1060, 1069, n. 6 (CA1 1989), there would have been no reason for Congress to add that section if the existing SIP automatically became unenforceable after some period of EPA delay. The existence of this explicit exception indicates that in all other circumstances the existing SIP remains in effect.

[4] As the Court of Appeals observed, the statutory remedies for EPA inaction include a suit to compel agency action under § 304(a)(2), 42 U. S. C. § 7604(a)(2) (1982 ed.), and a request pursuant to § 113(b), 42 U. S. C. § 7413(b) (1982 ed.), for reduction or elimination of penalties during any period in which unreasonable agency delay results in prejudice. 876 F. 2d, at 1067–1068.

[5] The Commonwealth of Massachusetts, the State whose interests are involved here, in a brief joined by 12 other States, asserts that its interest

v. *Pierce County*, 476 U. S. 253, 260 (1986) ("We would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake. When, as here, there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act" (footnote omitted)). In the absence of a specific provision suggesting that Congress intended to create an enforcement bar, we decline to infer one.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

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is better served by preserving EPA's ability to enforce the Act. See Brief for Massachusetts et al. as *Amici Curiae* 10–12.

Syllabus

TEXACO INC. *v.* HASBROUCK, DBA RICK'S TEXACO, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 87–2048. Argued December 5, 1989—Decided June 14, 1990

Between 1972 and 1981, petitioner Texaco sold gasoline at its retail tank wagon prices to respondent independent Texaco retailers but granted substantial discounts to distributors Gull and Dompier. Gull resold the gas under its own name; the fact that it was being supplied by Texaco was unknown to respondents. Dompier paid a higher price than Gull and supplied its gas under the Texaco brand name to retail stations. With the encouragement of Texaco, Dompier entered the retail market directly. Both distributors picked up gas at the Texaco plant and delivered it directly to their retail outlets, and neither maintained any significant storage facilities. Unlike Gull, Dompier received an additional discount from Texaco for the deliveries. Texaco executives were well aware of Dompier's dramatic growth and attributed it to the magnitude of the discounts. During the relevant period, the stations supplied by the distributors increased their sales volume dramatically, while respondents' sales suffered a corresponding decline. In 1976, respondents filed suit against Texaco under the Robinson-Patman Act amendment to the Clayton Act (Act), alleging that the distributor discounts violated § 2(a) of the Act, which, among other things, forbids any person to "discriminate in price" between different purchasers of commodities, where the effect of such discrimination is substantially to "injure . . . competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." The jury awarded respondents actual damages. The District Court denied Texaco's motion for judgment notwithstanding the verdict. Texaco had claimed that, as a matter of law, its "functional discounts"—*i. e.*, discounts that are given to a purchaser based on its role in the supplier's distributive system and reflect, at least in a generalized sense, the services performed by the purchaser for the supplier—did not adversely affect competition within the meaning of the Act. The District Court rejected Texaco's argument, reasoning that the "presumed legality of functional discounts" had been rebutted by evidence that the amount of Gull's and Dompier's discounts was not reasonably related to the cost of any function they performed. The Court of Appeals affirmed.

Held:

1. Respondents have satisfied their burden of proving that Texaco violated the Act. Pp. 554–571.

(a) Texaco's argument that it did not "discriminate in price" within the meaning of § 2(a) by charging different prices is rejected in light of this Court's holding in *FTC* v. *Anheuser-Busch, Inc.*, 363 U. S. 536, 549, that "a price discrimination within the meaning of [§ 2(a)] is merely a price difference." Texaco's argument, which would create a blanket exemption for all functional discounts, has some support in the legislative history of the Act, but is foreclosed by the text of the Act itself, which plainly reveals a concern with competitive consequences at different levels of distribution and carefully defines two specific affirmative defenses that are unavailable. Pp. 556–559.

(b) Also rejected is Texaco's argument that, at least to the extent that Gull and Dompier acted as wholesalers, the price differentials did not "injure . . . competition" within the meaning of the Act. It is true that a legitimate functional discount that constitutes a reasonable reimbursement for the purchasers' actual marketing functions does not violate the Act. Thus, such a discount raises no inference of injury to competition under *FTC* v. *Morton Salt Co.*, 334 U. S. 37, 46–47. However, the Act does not tolerate a functional discount that is completely untethered either to the supplier's savings or the wholesaler's costs. This conclusion is consistent with Federal Trade Commission (FTC) practice, with *Perkins* v. *Standard Oil Co. of Cal.*, 395 U. S. 642, and with the analysis of antitrust commentators. The record here adequately supports the finding that Texaco violated the Act. There was an extraordinary absence of evidence to connect Gull's and Dompier's discounts to any savings enjoyed by Texaco. Both Gull and Dompier received the full discount on all purchases even though most of their volume was resold directly to consumers, and the extra margin on those sales obviously enabled them to price aggressively in both their retail and wholesale marketing. The *Morton Salt* presumption of adverse effect becomes all the more appropriate to the extent they competed with respondents in the retail market. Furthermore, the evidence indicates that Texaco was encouraging Dompier to integrate downward and was fully informed about the dramatic impact of the Dompier discount on the retail market at the same time that Texaco was inhibiting upward integration by respondents. Pp. 559–571.

2. There is no merit to Texaco's contention that the damages award must be judged excessive as a matter of law. Texaco's theory improperly blurs the distinction between the liability and damages issues. There is no doubt that respondents' proof of a continuing violation as to the discounts to both distributors throughout the 9-year damages period

was sufficient. Proof of the specific amount of their damages necessarily was less precise, but the expert testimony provided a sufficient basis for an acceptable estimate of the amount of damages. Cf., *e. g.*, *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U. S. 557, 565–566. Pp. 571–573.

842 F. 2d 1034, affirmed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, MARSHALL, BLACKMUN, and O'CONNOR, JJ., joined. WHITE, J., filed an opinion concurring in the result, *post*, p. 573. SCALIA, J., filed an opinion concurring in the judgment, in which KENNEDY, J., joined, *post*, p. 576.

Peter M. Fishbein argued the cause for petitioner. On the briefs were *Milton J. Schubin*, *Joshua F. Greenberg*, *Michael Malina*, *Joseph P. Foley*, and *Wm. Fremming Nielsen*.

Michael R. Dreeben argued the cause for the United States et al. as *amici curiae* urging reversal. With him on the briefs were *Solicitor General Starr*, *Acting Assistant Attorney General Whalley*, *Deputy Solicitor General Merrill*, *Catherine G. O'Sullivan*, and *Kevin J. Arquit*.

Robert H. Whaley argued the cause for respondents. With him on the brief were *John S. Ebel* and *Lucinda S. Whaley*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Petroleum Institute et al. by *Edwin M. Zimmerman*, *G. William Frick*, *Jan S. Amundson*, and *Quentin Riegel*; for the Motor and Equipment Manufacturers Association by *Lawrence F. Henneberger* and *Marc L. Fleischaker*; for the Motor Vehicle Manufacturers Association of the United States, Inc., by *Irving Scher* and *William H. Crabtree*; for the National Association of Texaco Wholesalers by *Gregg R. Potvin* and *William L. Taylor*; for the National Association of Wholesaler-Distributors by *Louis R. Marchese* and *Neil J. Kuenn*; and for the Petroleum Marketers Association of America by *Robert S. Bassman*, *Douglas B. Mitchell*, and *Alphonse M. Alfano*.

Briefs of *amici curiae* urging affirmance were filed for the State of Connecticut et al. by *Clarine Nardi Riddle*, Acting Attorney General of Connecticut, and *Robert M. Langer* and *William M. Rubenstein*, Assistant Attorneys General, *Don Siegelman*, Attorney General of Alabama, *Douglas B. Baily*, Attorney General of Alaska, and *Richard D. Monkman*, Assistant Attorney General, *John Steven Clark*, Attorney General of Ar-

JUSTICE STEVENS delivered the opinion of the Court.

Petitioner (Texaco) sold gasoline directly to respondents and several other retailers in Spokane, Washington, at its re-

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kansas, *John K. Van de Kamp*, Attorney General of California, *Andrea Sheridan Ordin*, Chief Assistant Attorney General, *Sanford N. Gruskin*, Assistant Attorney General, and *Lawrence R. Tapper*, Deputy Attorney General, *Robert A. Butterworth*, Attorney General of Florida, *Warren Price III*, Attorney General of Hawaii, *Jim Jones*, Attorney General of Idaho, and *Catherine K. Broad*, Deputy Attorney General, *Neil F. Hartigan*, Attorney General of Illinois, *Robert Ruiz*, Solicitor General, and *John W. McCaffrey*, Senior Assistant Attorney General, *Linley E. Pearson*, Attorney General of Indiana, and *Frank A. Baldwin*, Deputy Attorney General, *Thomas J. Miller*, Attorney General of Iowa, and *John R. Perkins*, Deputy Attorney General, *Robert T. Stephan*, Attorney General of Kansas, *Frederic J. Cowan*, Attorney General of Kentucky, and *James M. Ringo*, Assistant Attorney General, *William J. Guste, Jr.*, Attorney General of Louisiana, and *Anne F. Benoit*, Assistant Attorney General, *James E. Tierney*, Attorney General of Maine, and *Stephen L. Wessler*, Deputy Attorney General, *J. Joseph Curran, Jr.*, Attorney General of Maryland, and *Michael F. Brockmeyer* and *R. Hartman Roemer*, Assistant Attorneys General, *James M. Shannon*, Attorney General of Massachusetts, and *George K. Weber*, *Malcolm L. Russell-Einhorn*, and *Thomas M. Alpert*, Assistant Attorneys General, *Frank J. Kelley*, Attorney General of Michigan, *William L. Webster*, Attorney General of Missouri, and *Clayton S. Friedman*, Assistant Attorney General, *Marc Racicot*, Attorney General of Montana, *Brian McKay*, Attorney General of Nevada, and *J. Kenneth Creighton*, Deputy Attorney General, *John P. Arnold*, Attorney General of New Hampshire, and *Terry Robertson*, Senior Assistant Attorney General, *Lacy H. Thornburg*, Attorney General of North Carolina, *James C. Gulick*, Special Deputy Attorney General, and *K. D. Sturgis*, Assistant Attorney General, *Nicholas J. Spaeth*, Attorney General of North Dakota, and *David W. Huey*, Assistant Attorney General, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *Dave Frohnmayer*, Attorney General of Oregon, *Ernest D. Preate, Jr.*, Attorney General of Pennsylvania, *Eugene F. Waye*, Chief Deputy Attorney General, and *Carl S. Hisiro*, Senior Deputy Attorney General, *James E. O'Neil*, Attorney General of Rhode Island, and *Robyn Y. Davis*, Assistant Attorney General, *Roger A. Tellinghuisen*, Attorney General of South Dakota, and *Jeffrey P. Hallem*, Assistant Attorney General, *Charles W. Burson*, Attorney General of Tennessee, and *Perry Allan Craft*, Deputy Attorney General, *Jim Mattox*, Attorney General of Texas, *Mary F. Keller*, First Assistant Attorney Gen-

tail tank wagon (RTW) prices while it granted substantial discounts to two distributors. During the period between 1972 and 1981, the stations supplied by the two distributors increased their sales volume dramatically, while respondents' sales suffered a corresponding decline. Respondents filed an action against Texaco under the Robinson-Patman Act amendment to the Clayton Act (Act), 38 Stat. 730, as amended, 49 Stat. 1526, 15 U. S. C. § 13, alleging that the distributor discounts violated § 2(a) of the Act, 15 U. S. C. § 13(a). Respondents recovered treble damages, and the Court of Appeals for the Ninth Circuit affirmed the judgment. 842 F. 2d 1034 (1988). We granted certiorari, 490 U. S. 1105 (1989), to consider Texaco's contention that legitimate functional discounts do not violate the Act because a seller is not responsible for its customers' independent resale pricing decisions. While we agree with the basic thrust of Texaco's argument, we conclude that in this case it is foreclosed by the facts of record.

I

Given the jury's general verdict in favor of respondents, disputed questions of fact have been resolved in their favor. There seems, moreover, to be no serious doubt about the character of the market, Texaco's pricing practices, or the relative importance of Texaco's direct sales to retailers

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eral, *Lou McCreary*, Executive Assistant Attorney General, and *Allene D. Evans* and *Donna L. Nelson*, Assistant Attorneys General, *Paul Van Dam*, Attorney General of Utah, and *Arthur M. Strong*, Assistant Attorney General, *Jeffrey L. Amestoy*, Attorney General of Vermont, *Kenneth O. Eikenberry*, Attorney General of Washington, and *James M. Beaulaurier*, Assistant Attorney General, and *Joseph B. Meyer*, Attorney General of Wyoming, and *Hugh Kenny*, Assistant Attorney General; for the National Coalition of Petroleum Retailers by *Jerry S. Cohen;* and for the Service Station Dealers of America by *Dimitri G. Daskalopoulos.*

Briefs of *amici curiae* were filed for Boise Cascade Corp. by *Victor E. Grimm* and *Scott M. Mendel;* and for the Society of Independent Gasoline Marketers of America et al. by *William W. Scott* and *Christopher J. MacAvoy.*

("throughput" business) and its sales to distributors. The principal disputes at trial related to questions of causation and damages.

Respondents are 12 independent Texaco retailers. They displayed the Texaco trademark, accepted Texaco credit cards, and bought their gasoline products directly from Texaco. Texaco delivered the gasoline to respondents' stations.

The retail gasoline market in Spokane was highly competitive throughout the damages period, which ran from 1972 to 1981. Stations marketing the nationally advertised Texaco gasoline competed with other major brands as well as with stations featuring independent brands. Moreover, although discounted prices at a nearby Texaco station would have the most obvious impact on a respondent's trade, the cross-city traffic patterns and relatively small size of Spokane produced a citywide competitive market. See, *e. g.*, App. 244, 283–291. Texaco's throughput sales in the Spokane market declined from a monthly volume of 569,269 gallons in 1970 to 389,557 gallons in 1975. *Id.*, at 487–488. Texaco's independent retailers' share of the market for Texaco gas declined from 76% to 49%.[1] *Ibid.* Seven of the respondents' stations were out of business by the end of 1978. *Id.*, at 22–23, Record 501.

Respondents tried unsuccessfully to increase their ability to compete with lower priced stations. Some tried converting from full service to self-service stations. See, *e. g.*, App. 55–56. Two of the respondents sought to buy their own tank trucks and haul their gasoline from Texaco's supply point, but Texaco vetoed that proposal. *Id.*, at 38–41, 59.

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[1] The independent retailers' share includes not only the market share for the 12 respondents, who operated a total of 13 stations, but also the share of some independent Texaco retailers who are not parties to this action. Texaco had 27 independent dealers in the Spokane market in 1970, and 19 in 1975. App. 22, 487–488.

While the independent retailers struggled, two Spokane gasoline distributors supplied by Texaco prospered. Gull Oil Company (Gull) had its headquarters in Seattle and distributed petroleum products in four Western States under its own name. *Id.*, at 94–95. In Spokane it purchased its gas from Texaco at prices that ranged from 6¢ to 4¢ below Texaco's RTW price. *Id.*, at 31–32. Gull resold that product under its own name; the fact that it was being supplied by Texaco was not known by either the public or the respondents. See, *e. g.*, *id.*, at 256. In Spokane, Gull supplied about 15 stations; some were "consignment stations" and some were "commission stations." In both situations Gull retained title to the gasoline until it was pumped into a motorist's tank. In the consignment stations, the station operator set the retail prices, but in the commission stations Gull set the prices and paid the operator a commission. Its policy was to price its gasoline at a penny less than the prevailing price for major brands. Gull employed two truckdrivers in Spokane who picked up product at Texaco's bulk plant and delivered it to the Gull stations. It also employed one supervisor in Spokane. Apart from its trucks and investment in retail facilities, Gull apparently owned no assets in that market. *Id.*, at 96–109, 504–512. At least with respect to the commission stations, Gull is fairly characterized as a retailer of gasoline throughout the relevant period.

The Dompier Oil Company (Dompier) started business in 1954 selling Quaker State Motor Oil. In 1960 it became a full line distributor of Texaco products, and by the mid-1970's its sales of gasoline represented over three-quarters of its business. *Id.*, at 114–115. Dompier purchased Texaco gasoline at prices of 3.95¢ to 3.65¢ below the RTW price. Dompier thus paid a higher price than Gull, but Dompier, unlike Gull, resold its gas under the Texaco brand names. *Id.*, at 24, 29–30. It supplied about 8 to 10 Spokane retail stations. In the period prior to October 1974, two of those stations were owned by the president of Dompier but the others were inde-

pendently operated. See, *e. g.*, *id.*, at 119–121, 147–148. In the early 1970's, Texaco representatives encouraged Dompier to enter the retail business directly, and in 1974 and 1975 it acquired four stations.[2] *Id.*, at 114–135, 483–503. Dompier's president estimated at trial that the share of its total gasoline sales made at retail during the middle 1970's was "[p]robably 84 to 90 percent." *Id.*, at 115.

Like Gull, Dompier picked up Texaco's product at the Texaco bulk plant and delivered directly to retail outlets. Unlike Gull, Dompier owned a bulk storage facility, but it was seldom used because its capacity was less than that of many retail stations. Again unlike Gull, Dompier received from Texaco the equivalent of the common carrier rate for delivering the gasoline product to the retail outlets. Thus, in addition to its discount from the RTW price, Dompier made a profit on its hauling function.[3] *Id.*, at 123–131, 186–192, 411–413.

The stations supplied by Dompier regularly sold at retail at lower prices than respondents'. Even before Dompier directly entered the retail business in 1974, its customers were

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[2] "Q. Did you have any conversations with Texaco during this period of time encouraging you to—Dompier Oil Company to change its emphasis and to move into the retail business? A. Yes, we did.

"Q. Would you tell the jury about that? [A.] Well, at various times Texaco encouraged us to begin supplying retail service stations. In the early Seventies they did that, and then as time went on, they encouraged us to own the stations that we were supplying; in other words, to try to control our own retail business. And beginning about 1974—we did purchase a station in '74 and some more in '75 and we began operating those as company operations with salaried company employees." *Id.*, at 116–117.

[3] "Q. That would have been a rate—that if you had hired a common carrier to haul the product for you, you would have paid them to haul it? A. That's right.

"Q. And do you understand—to your understanding does that common carrier rate have a built-in-profit? A. I am sure that it does.

"Q. Did you find it to be an advantage to you to be hauling your own product? A. Yes." *Id.*, at 126.

selling to consumers at prices barely above the RTW price. *Id.*, at 329–338; Record 315, 1250–1251. Dompier's sales volume increased continuously and substantially throughout the relevant period. Between 1970 and 1975 its monthly sales volume increased from 155,152 gallons to 462,956 gallons; this represented an increase from 20.7% to almost 50% of Texaco's sales in Spokane. App. 487–488.

There was ample evidence that Texaco executives were well aware of Dompier's dramatic growth and believed that it was attributable to "the magnitude of the distributor discount and the hauling allowance."[4] See also, *e. g.*, *id.*, at 213–223, 407–413. In response to complaints from individual respondents about Dompier's aggressive pricing, however, Texaco representatives professed that they "couldn't understand it." Record 401–404.

II

Respondents filed suit against Texaco in July 1976. After a 4-week trial, the jury awarded damages measured by the difference between the RTW price and the price paid by Dompier. As we subsequently decided in *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U. S. 557 (1981), this measure of damages was improper. Accordingly, although it rejected Texaco's defenses on the issue of liability,[5] the Court of Appeals for the Ninth Circuit remanded the case for

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[4] At trial one of Texaco's defenses was based on its obligation to comply with certain federal regulations during periods of shortage. In one of its communications to the Federal Government, a Texaco vice president wrote, in part:

"We believe that the dramatic shift in gasoline sales from the independent retailer classes of purchaser to the independent distributor classes of purchaser can be explained almost entirely by the magnitude of the distributor discount and the hauling allowance." *Id.*, at 413.

[5] Texaco had argued that its pricing practices were mandated by federal regulations and that its sales in the Spokane market were not "in commerce" within the meaning of the Act.

a new trial. *Hasbrouck* v. *Texaco, Inc.*, 663 F. 2d 930 (1981), cert. denied, 459 U. S. 828 (1982).

At the second trial, Texaco contended that the special prices to Gull and Dompier were justified by cost savings,[6] were the product of a good-faith attempt to meet competition,[7] and were lawful "functional discounts." The District Court withheld the cost justification defense from the jury because it was not supported by the evidence and the jury rejected the other defenses. It awarded respondents actual damages of $449,900.[8] The jury apparently credited the testimony of respondents' expert witness who had estimated what the respondents' profits would have been if they had paid the same prices as the four stations owned by Dompier. See 634 F. Supp. 34, 43 (ED Wash. 1985); 842 F. 2d, at 1043–1044.

In Texaco's motion for judgment notwithstanding the verdict, it claimed as a matter of law that its functional discounts did not adversely affect competition within the meaning of the Act because any injury to respondents was attributable to decisions made independently by Dompier. The District Court denied the motion. In an opinion supplementing its oral ruling denying Texaco's motion for a directed verdict, the Court assumed, *arguendo*, that Dompier was entitled to a

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[6] Section 2(a) of the Act provides in part:

"That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered." 15 U. S. C. § 13(a).

[7] Section 2(b) of the Act provides in part:

"*Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." 15 U. S. C. § 13(b).

[8] The award to each particular respondent of course differed. The awards represented an average of $5,486.59 per year for each of the respondents.

functional discount, even on the gas that was sold at retail,[9] but nevertheless concluded that the "presumed legality of functional discounts" had been rebutted by evidence that the amount of the discounts to Gull and Dompier was not reasonably related to the cost of any function that they performed.[10] 634 F. Supp., at 37–38, and n. 4.

The Court of Appeals affirmed. It reasoned:

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[9] "While there is a serious question as to whether Dompier was entitled to a 'functional discount' on the gas it *resold at retail*, *compare Mueller Co.*, 60 F. T. C. 120 (1962), *aff'd*, 323 F. 2d 44 (7th Cir. 1963), *cert. denied*, 377 U. S. 923 . . . (1964) (entitlement to functional discount based on resale level) *with Doubleday and Co.*, 52 F. T. C. 169 (1955) (entitlement to functional discount based on level of purchase), the court assumes, *arguendo*, that the mere fact that Dompier retailed the gas does not preclude a 'functional discount.'" 634 F. Supp. 34, 37, n. 4 (ED Wash. 1985) (emphasis in original).

[10] "Secondly, the functional discounts negatively affected competition because they were, in part, reflected in the favored purchasers' (or their customers') retail prices. In other words, the discount was not consumed or absorbed at the level of the favored buyers; rather, the amount of the discount (or a significant portion) appeared in the favored purchasers' retail price, or in the favored purchasers' price to their customers and in their customers' retail prices. Under such circumstances, the otherwise innocuous nature and presumed legality of functional discounts is rebutted, for it is universally recognized that a functional discount remains legal only to the extent it acts as compensation for the functions performed by the favored buyer. See 3 Kintner & Bauer, *Federal Antitrust Law* 309–10 (1983); Rill, *Availability and Functional Discounts Justifying Discriminatory Pricing*, 53 Antitrust L. J. 929, 939–41 (1985). The discount must 'be reasonably related to the expenses assumed by the [favored] buyer' and the discount 'should not exceed the cost of . . . the function [the favored buyer] actually performs . . . ' *Doubleday and Company*, 52 F. T. C. at 209, *cited* in *Boise Cascade Corp.*, Docket No. 9133, slip op. at 117 (Feb. 14, 1984) (initial decision). If the discount exceeds such costs, it cannot be justified as a functional discount, particularly where, as here, the excess has a negative effect on competition.

"In this case Texaco made no serious attempt to quantitatively justify its functional discounts. While a precise accounting of the value of the performed functions is not mandated, merely identifying some of the functions is not sufficient. There is no substantial evidence to support Texaco's position that the discounts were justified." *Id.*, at 38 (footnote omitted).

"As the Supreme Court long ago made clear, and recently reaffirmed, there may be a Robinson-Patman violation even if the favored and disfavored buyers do not compete, so long as the customers of the favored buyer compete with the disfavored buyer or its customers. *Morton Salt*, 334 U. S. at 43–44 . . . ; *Perkins* v. *Standard Oil Co.*, 395 U. S. 642, 646–47 . . . (1969); *Falls City Indus., Inc.* v. *Vanco Beverages, Inc.*, 460 U. S. 428, 434–35 . . . (1983). Despite the fact that Dompier and Gull, at least in their capacities as wholesalers, did not compete directly with Hasbrouck, a section 2(a) violation may occur if (1) the discount they received was not cost-based and (2) all or a portion of it was passed on by them to customers of theirs who competed with Hasbrouck. *Morton Salt*, 334 U. S. at 43–44 . . . ; *Perkins* v. *Standard Oil*, 395 U. S. at 648–49 . . . ; *see* 3 E. Kintner & J. Bauer, *supra*, § 22.14.

"Hasbrouck presented ample evidence to demonstrate that . . . the services performed by Gull and Dompier were insubstantial and did not justify the functional discount." 842 F. 2d, at 1039.

The Court of Appeals concluded its analysis by observing:

"To hold that price discrimination between a wholesaler and a retailer could *never* violate the Robinson-Patman Act would leave immune from antitrust scrutiny a discriminatory pricing procedure that can effectively serve to harm competition. We think such a result would be contrary to the objectives of the Robinson-Patman Act." *Id.*, at 1040 (emphasis in original).

III

It is appropriate to begin our consideration of the legal status of functional discounts [11] by examining the language of the Act. Section 2(a) provides in part:

[11] In their brief filed as *amici curiae*, the United States and the Federal Trade Commission suggest the following definition of "functional discount,"

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . ." 15 U. S. C. § 13(a).

The Act contains no express reference to functional discounts.[12] It does contain two affirmative defenses that provide protection for two categories of discounts—those that

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which is adequate for our discussion: "A functional discount is one given to a purchaser based on its role in the supplier's distributive system, reflecting, at least in a generalized sense, the services performed by the purchaser for the supplier." Brief for United States et al. as *Amici Curiae* 10 (filed Aug. 3, 1989).

[12] The legislative history indicates that earlier drafts of the Act did include such a proviso. See, *e. g.*, Shniderman, "The Tyranny of Labels"—A Study of Functional Discounts Under the Robinson-Patman Act, 60 Harv. L. Rev. 571, 583–586, and nn. 40–57 (1947). The deletion of this exception for functional discounts has ambiguous significance. It may be, as one commentator has suggested, that the circumstances of the Act's passage "must have conveyed to the congressional mind the realization that the judiciary and the FTC would view what had occurred as a narrowing of the gates through which the functional classification plan of a seller had to pass to come within the law." *Id.*, at 588. In any event, the deletion in no way detracts from the blunt direction of the statutory text, which indicates that any price discrimination substantially lessening competition will expose the discriminator to liability, regardless of whether the discriminator attempts to characterize the pricing scheme as a functional discount.

are justified by savings in the seller's cost of manufacture, delivery, or sale,[13] and those that represent a good-faith response to the equally low prices of a competitor. *Standard Oil Co.* v. *FTC*, 340 U. S. 231, 250 (1951). As the case comes to us, neither of those defenses is available to Texaco.

In order to establish a violation of the Act, respondents had the burden of proving four facts: (1) that Texaco's sales to Gull and Dompier were made in interstate commerce; (2) that the gasoline sold to them was of the same grade and quality as that sold to respondents; (3) that Texaco discriminated in price as between Gull and Dompier on the one hand and respondents on the other; and (4) that the discrimination had a prohibited effect on competition. 15 U. S. C. § 13(a). Moreover, for each respondent to recover damages, he had the burden of proving the extent of his actual injuries. *J. Truett Payne*, 451 U. S., at 562.

The first two elements of respondents' case are not disputed in this Court,[14] and we do not understand Texaco to be challenging the sufficiency of respondents' proof of damages. Texaco does argue, however, that although it charged different prices, it did not "discriminate in price" within the meaning of the Act, and that, at least to the extent that Gull and Dompier acted as wholesalers, the price differentials did not injure competition. We consider the two arguments separately.

IV

Texaco's first argument would create a blanket exemption for all functional discounts. Indeed, carried to its logical conclusion, it would exempt all price differentials except those given to competing purchasers. The primary basis for

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[13] See n. 6, *supra*.

[14] Texaco has not contested here the proposition that branded gas and unbranded gas are of like grade and quality. See *FTC* v. *Borden Co.*, 383 U. S. 637, 645–646 (1966) ("'[T]he economic factors inherent in brand names and national advertising should not be considered in the jurisdictional inquiry under the statutory "like grade and quality" test'").

Texaco's argument is the following comment by Congressman Utterback, an active sponsor of the Act:

> "In its meaning as simple English, a discrimination is more than a mere difference. Underlying the meaning of the word is the idea that some relationship exists between the parties to the discrimination which entitles them to equal treatment, whereby the difference granted to one casts some burden or disadvantage upon the other. If the two are competing in the resale of the goods concerned, that relationship exists. Where, also, the price to one is so low as to involve a sacrifice of some part of the seller's necessary costs and profit as applied to that business, it leaves that deficit inevitably to be made up in higher prices to his other customers; and there, too, a relationship may exist upon which to base the charge of discrimination. But where no such relationship exists, where the goods are sold in different markets and the conditions affecting those markets set different price levels for them, the sale to different customers at those different prices would not constitute a discrimination within the meaning of this bill." 80 Cong. Rec. 9416 (1936).

We have previously considered this excerpt from the legislative history and have refused to draw from it the conclusion which Texaco proposes. *FTC* v. *Anheuser-Busch, Inc.*, 363 U. S. 536, 547–551 (1960). Although the excerpt does support Texaco's argument, we remain persuaded that the argument is foreclosed by the text of the Act itself. In the context of a statute that plainly reveals a concern with competitive consequences at different levels of distribution, and carefully defines specific affirmative defenses, it would be anomalous to assume that the Congress intended the term "discriminate" to have such a limited meaning. In *Anheuser-Busch* we rejected an argument identical to Texaco's in the context of a claim that a seller's price differential had injured

its own competitors—a so-called "primary line" claim.[15] The reasons we gave for our decision in *Anheuser-Busch* apply here as well. After quoting Congressman Utterback's statement in full, we wrote:

> "The trouble with respondent's arguments is not that they are necessarily irrelevant in a § 2(a) proceeding, but that they are misdirected when the issue under consideration is solely whether there has been a price discrimination. We are convinced that, whatever may be said with respect to the rest of §§ 2(a) and 2(b)—and we say nothing here—there are no overtones of business buccaneering in the § 2(a) phrase 'discriminate in price.' Rather, a price discrimination within the meaning of that provision is merely a price difference." *Id.*, at 549.

After noting that this view was consistent with our precedents, we added:

> "[T]he statute itself spells out the conditions which make a price difference illegal or legal, and we would derange this integrated statutory scheme were we to read other conditions into the law by means of the nondirective phrase, 'discriminate in price.' Not only would such action be contrary to what we conceive to be the meaning of the statute, but, perhaps because of this, it would be thoroughly undesirable. As one commentator has succinctly put it, 'Inevitably every legal controversy over any price difference would shift from the detailed governing provisions—"injury," cost justification, "meeting competition," etc.—over into the "discrimination" concept for *ad hoc* resolution divorced from specifically pertinent statutory text.' Rowe, Price Differen-

[15] It has proved useful in Robinson-Patman Act cases to distinguish among "the probable impact of the [price] discrimination on competitors of the seller (primary-line injury), on the favored and disfavored buyers (second-line injury), or on the customers of either of them (third-line injury)." See 3 E. Kintner & J. Bauer, Federal Antitrust Law § 20.9, p. 127 (1983).

tials and Product Differentiation: The Issues Under the Robinson-Patman Act, 66 Yale L. J. 1, 38." *Id.*, at 550–551.

Since we have already decided that a price discrimination within the meaning of § 2(a) "is merely a price difference," we must reject Texaco's first argument.

V

In *FTC* v. *Morton Salt Co.*, 334 U. S. 37, 46–47 (1948), we held that an injury to competition may be inferred from evidence that some purchasers had to pay their supplier "substantially more for their goods than their competitors had to pay." See also *Falls City Industries, Inc.* v. *Vanco Beverage, Inc.*, 460 U. S. 428, 435–436 (1983). Texaco, supported by the United States and the Federal Trade Commission as *amici curiae* (the Government), argues that this presumption should not apply to differences between prices charged to wholesalers and those charged to retailers. Moreover, they argue that it would be inconsistent with fundamental antitrust policies to construe the Act as requiring a seller to control his customers' resale prices. The seller should not be held liable for the independent pricing decisions of his customers. As the Government correctly notes, Brief for United States et. al. as *Amici Curiae* 21–22 (filed Aug. 3, 1989), this argument endorses the position advocated 35 years ago in the Report of the Attorney General's National Committee to Study the Antitrust Laws (1955).

After observing that suppliers ought not to be held liable for the independent pricing decisions of their buyers,[16] and

[16] "In the Committee's view, imposing on any dual supplier a legal responsibility for the resale policies and prices of his independent distributors contradicts basic antitrust policies. Resale-price fixing is incompatible with the tenets of a free and competitive economy. What is more, the arrangements necessary for policing, detecting, and reporting price cutters may be illegal even apart from the resale-price agreement itself. And even short of such arrangements, a conscious adherence in a supplier's sales to retail customers to the price quotations by independent competing

that without functional discounts distributors might go uncompensated for services they performed,[17] the Committee wrote:

> "The Committee recommends, therefore, that suppliers granting functional discounts either to single-function or to integrated buyers should not be held responsible for any consequences of their customers' pricing tactics. Price cutting at the resale level is not in fact, and should not be held in law, 'the effect of' a differential that merely accords due recognition and reimbursement for actual marketing functions. The price cutting of a customer who receives this type of differential results from his own independent decision to lower price and operate at a lower profit margin per unit. The legality or illegality of this price cutting must be judged by the usual legal tests. In any event, consequent injury or lack of injury should not be the supplier's legal concern.
>
> "On the other hand, the law should tolerate no subterfuge. For instance, where a wholesaler-retailer *buys* only part of his goods as a wholesaler, he must not claim a functional discount on all. Only to the extent that a buyer *actually* performs certain functions, assuming all the risk, investment, and costs involved, should he le-

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distributors is hardly feasible as a matter of business operation, or safe as a matter of law." Report of the Attorney General's National Committee to Study the Antitrust Laws 206–207 (1955) (footnotes omitted).

[17] "In our view, to relate discounts or prices solely to the purchaser's resale activities without recognition of his buying functions thwarts competition and efficiency in marketing. It compels affirmative discrimination *against* a substantial class of distributors, and hence serves as a penalty on integration. If a businessman actually fulfills the wholesale function by relieving his suppliers of risk, storage, transportation, administration, etc., his performance, his capital investment, and the saving to his suppliers, are unaffected by whether he also performs the retailing function, or any number of other functions. A legal rule disqualifying him from discounts recognizing wholesaling functions actually performed compels him to render these functions free of charge." *Id.*, at 207.

> gally qualify for a functional discount. Hence a distributor should be eligible for a discount corresponding to any part of the function he actually performs on that part of the goods for which he performs it." *Id.*, at 208.

We generally agree with this description of the legal status of functional discounts. A supplier need not satisfy the rigorous requirements of the cost justification defense in order to prove that a particular functional discount is reasonable and accordingly did not cause any substantial lessening of competition between a wholesaler's customers and the supplier's direct customers.[18] The record in this case, however, adequately supports the finding that Texaco violated the Act.

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[18] In theory, a supplier could try to defend a functional discount by invoking the Act's cost justification defense, but the burden of proof with respect to the defense is upon the supplier, and interposing the defense "has proven difficult, expensive, and often unsuccessful." 3 E. Kintner & J. Bauer, Federal Antitrust Law § 23.19, pp. 366–367 (1983). Moreover, to establish the defense a "seller must show that the price reductions given did not exceed the actual cost savings," *id.*, § 23.10, p. 345, and this requirement of exactitude is ill suited to the defense of discounts set by reference to legitimate, but less precisely measured, market factors. Cf. Calvani, Functional Discounts Under the Robinson-Patman Act, 17 B. C. Ind. & Com. L. Rev. 543, 546, n. 16 (1976) (distinguishing functional discounts from cost justified price differences); Report of the Attorney General's National Commmittee on the Antitrust Laws, at 171 ("[T]he cost defense has proved largely illusory in practice").

Discounters will therefore likely find it more useful to defend against claims under the Act by negating the causation element in the case against them: A legitimate functional discount will not cause any substantial lessening of competition. The concept of substantiality permits the causation inquiry to accommodate a notion of economic reasonableness with respect to the pass-through effects of functional discounts, and so provides a latitude denied by the cost justification defense. Cf. Shniderman, 60 Harv. L. Rev., at 603–604 (substantiality defense in functional discount cases). We thus find ourselves in substantial agreement with the view that:

"Conceived as a vehicle for allowing differential pricing to reward distributive efficiencies among customers operating at the same level, the cost justification defense focuses on narrowly defined savings to the seller derived from the different method or quantities in which goods are sold or delivered to different buyers . . . . Moreover, the burden of proof as to the cost

The hypothetical predicate for the Committee's entire discussion of functional discounts is a price differential "that merely accords due recognition and reimbursement for actual marketing functions." Such a discount is not illegal. In this case, however, both the District Court and the Court of Appeals concluded that even without viewing the evidence in the light most favorable to respondents, there was no substantial evidence indicating that the discounts to Gull and Dompier constituted a reasonable reimbursement for the value to Texaco of their actual marketing functions. 842 F. 2d, at 1039; 634 F. Supp., at 37, 38. Indeed, Dompier was separately compensated for its hauling function, and neither Gull nor Dompier maintained any significant storage facilities.

Despite this extraordinary absence of evidence to connect the discount to any savings enjoyed by Texaco, Texaco contends that the decision of the Court of Appeals cannot be affirmed without departing "from established precedent, from practicality, and from Congressional intent." Brief for Petitioner 14.[19] This argument assumes that holding suppliers liable for a gratuitous functional discount is somehow a novel practice. That assumption is flawed.

As we have already observed, the "due recognition and reimbursement" concept endorsed in the Attorney General's

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justification defense is on the seller charged with violating the Act, whereas the burden of proof remains with the enforcement agency or plaintiff in circumstances involving functional discounts since functional pricing negates the probability of competitive injury, an element of a prima facie case of violation." Rill, Availability and Functional Discounts Justifying Discriminatory Pricing, 53 Antitrust L. J. 929, 935 (1985) (footnotes omitted).

[19] Texaco continues the argument by summoning a parade of horribles whose march Texaco believes is at issue in this case: According to Texaco, the Court of Appeals' rule "would multiply distribution costs, rigidify and increase consumer prices, encourage resale price maintenance in violation of the Sherman Act . . . , and jeopardize the businesses of wholesalers." Brief for Petitioner 14.

Committee's study would not countenance a functional discount completely untethered to either the supplier's savings or the wholesaler's costs. The longstanding principle that functional discounts provide no safe harbor from the Act is likewise evident from the practice of the Federal Trade Commission, which has, while permitting legitimate functional discounts, proceeded against those discounts which appeared to be subterfuges to avoid the Act's restrictions. See, *e. g.*, *In re Sherwin Williams Co.*, 36 F. T. C. 25, 70–71 (1943) (finding a violation of the Act by paint manufacturers who granted "functional or special discounts to some of their dealer-distributors on the purchases of such dealer-distributors which are resold by such dealer-distributors directly to the consumer through their retail departments or branch stores wholly owned by them"); *In re Ruberoid Co.*, 46 F. T. C. 379, 386, ¶ 5 (1950) (liability appropriate when functional designations do not always indicate accurately "the functions actually performed by such purchasers"), aff'd, 189 F. 2d 893 (CA2 1951), rev'd on rehearing, 191 F. 2d 294, aff'd, 343 U. S. 470 (1952).[20] See also, *e. g.*, *In re Doubleday &*

[20] See also, *e. g.*, *In re Whiting*, 26 F. T. C. 312, 316, ¶ 3 (1938) (functional classification of customers involved unlawful price discrimination because of functional overlap); *In re Standard Oil Co.*, 41 F. T. C. 263 (1945), modified and aff'd, 173 F. 2d 210, 217 (CA7 1949) ("The petitioner should be liable if it sells to a wholesaler it knows or ought to have known . . . is using or intends to use [the wholesaler's] price advantage to undersell the petitioner in its prices made to its retailers"), rev'd and remanded on other grounds, 340 U. S. 231 (1951).

In the *Standard Oil* case, the FTC itself on remand dropped the part of its order prohibiting Standard Oil from giving functional discounts. See C. Edwards, Price Discrimination Law 309 (1959). The FTC's pre-remand theory in the *Standard Oil* case has of course been the subject of harsh criticism. See, *e. g.*, Report of the Attorney General's National Committee to Study the Antitrust Laws, at 206. Much, if not all, of this criticism rests upon the view that, under the FTC's *Standard Oil* ruling, a "supplier is charged with legal responsibility for the middlemen's pricing tactics, and hence must control *their* resale prices lest they undercut him to the unlawful detriment of his directly purchasing retailers. Alternatively,

Co., 52 F. T. C. 169, 209 (1955) ("[T]he Commission should tolerate no subterfuge. Only to the extent that a buyer actually performs certain functions, assuming all the risks and costs involved, should he qualify for a compensating discount. The amount of the discount should be reasonably related to the expenses assumed by the buyer"); *In re General Foods Corp.*, 52 F. T. C. 798, 824–825 (1956) ("A seller is not forbidden to sell at different prices to buyers in different functional classes and orders have been issued permitting lower prices to one functional class as against another, provided that injury to commerce as contemplated in the law does not result," but "[t]o hold that the rendering of special services ipso facto [creates] a separate functional classification would be to read Section 2(d) out of the Act"); *In re Boise Cascade Corp.*, 107 F. T. C. 76, 212, 214–215 (1986) (regardless of whether the FTC has judged functional discounts by reference to the supplier's savings or the buyer's costs, the FTC has recognized that "functional discounts may usually be granted to customers who operate at different levels of trade, and thus do not compete with each other, without risk of secondary line competitive injury under the Act"), rev'd on other grounds, 267 U. S. App. D. C. 124, 837 F. 2d 1127 (1988).[21]

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the seller may forego his operational freedom by matching *his* quotations to retailers with *theirs*." *Ibid.* Nothing in our opinion today should be read to condone or approve such a result.

[21] See also *In re Mueller Co.*, 60 F. T. C. 120, 127–128 (1962) (refusing to make allowance for functional discounts in any way that would "add a defense to a *prima facie* violation of Section 2(a) which is not included in either Section 2(a) or Section 2(b)"), aff'd, 323 F. 2d 44 (CA7 1963), cert. denied, 377 U. S. 923 (1964). The FTC in *Mueller* expressly disavowed dicta from *Doubleday* suggesting that functional discounts are *per se* legal if justified by the buyer's costs. *Mueller* held that the discounts were controlled instead by the reasoning propounded in *General Foods*, which refers to the value of the services to the supplier giving the discount. 60 F. T. C., at 127–128.

We need not address the relative merits of *Mueller* and *Doubleday* in order to resolve the case before us. We do, however, reject the require-

Cf. *FLM Collision Parts, Inc.* v. *Ford Motor Co.*, 543 F. 2d 1019, 1027 (CA2 1976) ("We do not suggest or imply that, if a manufacturer grants a price discount or allowance to its wholesalers (whether or not labelled 'incentive'), which has the purpose or effect of defeating the objectives of the Act, § 2(a)'s language may not be construed to defeat it"); C. Edwards, Price Discrimination Law 286–348 (1959) (analyzing cases).[22]

Most of these cases involved discounts made questionable because offered to "complex types of distributors" whose "functions became scrambled." *Doubleday & Co.*, 52 F. T. C., at 208. This fact is predictable: Manufacturers will more likely be able to effectuate tertiary line price discrimination through functional discounts to a secondary line buyer when

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ment of exactitude which might be inferred from *Doubleday*'s dictum that a functional discount offered to a buyer "should not exceed the cost of that part of the function he actually performs on that part of the goods for which he performs it." 52 F. T. C., at 209. As already noted, a causation defense in a functional discount case does not demand the rigorous accounting associated with a cost justification defense.

[22] The Government's position in this case does not contradict this course of decision. The Government's *amicus* brief on Texaco's behalf criticizes the Court of Appeals opinion on the theory that it "would require a supplier to show that a functional discount is justified by the wholesaler's costs," and that it imposed "liability for downstream competitive effects of legitimate functional discounts." Brief for United States et al. as *Amici Curiae* 6 (filed Aug. 3, 1989). Cf. *Boise Cascade Corp.* v. *FTC*, 267 U. S. App. D. C. 124, 138–140, 837 F. 2d 1127, 1141–1143 (1988) (summarizing debate about relevance of buyer's costs to defense of functional discounts). If the Court of Appeals were indeed to have endorsed either of these rules, it would have departed perceptibly from the mainstream of the FTC's reading of the Act. We need not decide whether the Government's interpretation of the Court of Appeals opinion is correct, for we affirm its judgment for reasons that do not entail the principles criticized by the Government. Indeed, the Government itself opposed the petition for certiorari in this case on the ground that "we do not think that this case on its facts presents the broad issue that petitioner discusses (whether a supplier must show that its discounts to wholesalers relative to retailers are cost based)." Brief for United States as *Amicus Curiae* 12 (filed May 16, 1989).

the favored distributor is vertically integrated. Nevertheless, this general tendency does not preclude the possibility that a seller may pursue a price discrimination strategy despite the absence of any discrete mechanism for allocating the favorable price discrepancy between secondary and tertiary line recipients.[23]

Indeed, far from constituting a novel basis for liability under the Act, the fact pattern here reflects conduct similar to that which gave rise to *Perkins* v. *Standard Oil Co. of Cal.*, 395 U. S. 642 (1969). Perkins purchased gas from Standard, and was both a distributor and a retailer. He asserted that his retail business had been damaged through two violations of the Act by Standard: First, Standard had sold directly to its own retailers at a price below that charged to Perkins; and, second, Standard had sold to another distributor, Signal, which sold gas to Western Hyway, which in turn

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[23] The seller may be willing to accept any division of the price difference so long as some significant part is passed on to the distributor's customers. Although respondents here did not need to show any benefit to Texaco from the price discrimination scheme in order to establish a violation of the Act, one possibility is indicated by the brief filed *amicus curiae* by the Service Station Dealers of America (SSDA), an organization representing both stations supplied by independent jobbers and stations supplied directly by sellers. See Brief for SSDA as *Amicus Curiae* 1–2. SSDA suggests that an indirect price discount to competitors may be used to force directly supplied franchisees out of the market, and so to circumvent federal restrictions upon the termination of franchise agreements. See 92 Stat. 324–332, 15 U. S. C. §§ 2801–2806.

One would expect that—absent a safe harbor rule making functional discounts a useful means to engage in otherwise unlawful price discrimination—excessive functional discounts of the sort in evidence here would be rare. As the Government correctly observes, "[t]his case appears to reflect rather anomalous behavior on the part of the supplier." Brief for United States et al. as *Amici Curiae* 17, n. 15 (filed Aug. 3, 1989). See also Brief for United States as *Amicus Curiae* 15 (filed May 16, 1989) ("[M]arket forces should tend to discourage a supplier from offering independent wholesalers discounts that would allow them to undercut the supplier's own retail customers").

sold gas to Regal, a retailer in competition with Perkins.[24] The question presented was whether the Act—which refers to discriminators, purchasers, and their customers—covered injuries to competition between purchasers and the customers of customers of purchasers. *Id.*, at 646–647. We held that a limitation excluding such "fourth level" competition would be "wholly an artificial one." *Id.*, at 647. We reasoned that from "Perkins' point of view, the competitive harm done him by Standard is certainly no less because of the presence of an additional link in this particular distribution chain from the producer to the retailer."[25] The same may justly be said in this case. The additional link in the distribution chain does not insulate Texaco from liability if Texaco's excessive discount otherwise violated the Act.[26]

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[24] Much of Perkins' case parallels that of respondents. "There was evidence that Signal received a lower price from Standard than did Perkins, that this price advantage was passed on, at least in part, to Regal, and that Regal was thereby able to undercut Perkins' price on gasoline. Furthermore there was evidence that Perkins repeatedly complained to Standard officials that the discriminatory price advantage given Signal was being passed down to Regal and evidence that Standard officials were aware that Perkins' business was in danger of being destroyed by Standard's discriminatory practices. This evidence is sufficient to sustain the jury's award of damages under the Robinson-Patman Act." 395 U. S., at 649.

[25] We added: "Here Standard discriminated in price between Perkins and Signal, and there was evidence from which the jury could conclude that Perkins was harmed competitively when Signal's price advantage was passed on to Perkins' retail competitor Regal. These facts are sufficient to give rise to recoverable damages under the Robinson-Patman Act." *Id.*, at 648.

[26] In fact, the principle applied in *Perkins*—that we will not construe the Robinson-Patman Act in a way that "would allow price discriminators to avoid the sanctions of the Act by the simple expedient of adding an additional link to the distribution chain," *id.*, at 647—seems capable of governing this case as well. It might be possible to view *Perkins* as standing for a narrower proposition, either because Signal apparently exercised majority control over the intermediary, Western Hyway, and its retailer, Regal, see *id.*, at 651 (MARSHALL, J., concurring in part and dissenting in part),

Nor should any reader of the commentary on functional discounts be much surprised by today's result. Commentators have disagreed about the extent to which functional discounts are generally or presumptively allowable under the Robinson-Patman Act. They nevertheless tend to agree that in exceptional cases what is nominally a functional discount may be an unjustifiable price discrimination entirely within the coverage of the Act.[27] Others, like Frederick

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or because Standard did not assert that its price to Signal reflected a "functional discount." However, as the *Perkins* dissent pointed out, *ibid.*, the *Perkins* majority did not put any such limits on the principle it declared.

[27] See, *e. g.*, Celnicker & Seaman, Functional Discounts, Trade Discounts, Economic Price Discrimination and the Robinson-Patman Act, 1989 Utah L. Rev. 813, 857 (1989) (concluding that "[t]rade discounts often are manifestations of economic price discrimination. . . . If a trade discount violates the normal competitive disadvantage criteria used under the Act, no special devices should be employed to protect it"); Rill, 53 Antitrust L. J., at 940–941 ("Although it is entirely appropriate for the FTC and the courts to insist that some substantial services be performed in order for a buyer to earn a functional discount, a requirement of precise mathematical equivalency makes no sense"); 3 E. Kintner & J. Bauer, Federal Antitrust Law 318–320, and n. 305 (1983) ("Functional discounts . . . are usually deemed lawful," but this usual rule is subject to exception in cases, "arising in unusual circumstances," when the seller's "discrimination *caused*" the tertiary line injury); Calvani, 17 B. C. Ind. & Com. L. Rev., at 549, and n. 26 (discounts to wholesalers are generally held not to injure competition, but this rule is subject to qualifications, and "[p]erhaps the most important caveat focuses on the situation where the seller sells to both resellers and consumers and the resellers pass on to their consumers all or part of the wholesaling functional discount"); C. Edwards, Price Discrimination Law 312–313 (1959) ("It is not surprising that from time to time the Commission has been unable to avoid finding injurious discrimination between direct and indirect customers nor to avoid corrective orders that sought to define the gap between prices at successive levels of distribution"); Kelley, Functional Discounts Under the Robinson-Patman Act, 40 Calif. L. Rev. 526, 556 (1952) (concluding that the "characterization of a price differential between two purchasers as a functional or trade discount accords it no cloak of immunity from the prohibitions of the Robinson-Patman Act"); Shniderman, 60 Harv. L. Rev., at 599–600 (Commission's approach to functional discounts "may have been influenced by the possibility of subtle price

Rowe, have asserted the legitimacy of functional discounts in more sweeping terms,[28] but even Rowe concedes the existence of an "exception to the general rule." Rowe 174, n. 7; *id.*, at 195–205.[29]

We conclude that the commentators' analysis, like the reasoning in *Perkins* and like the Federal Trade Commission's practice, renders implausible Texaco's contention that holding it liable here involves some departure from established understandings. Perhaps respondents' case against Texaco

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discriminating techniques through the employment of wholesalers receiving more than ample discount differentials").

Professor Edwards, among others, describes the status of functional discounts under the Robinson-Patman Act with clear dissatisfaction. He complains that "[t]he failure of the Congress to cope with the problem . . . has left the Commission an impossible job in this type of case." Price Discrimination Law, at 313. He adds that the Commission's "occasional proceedings" have been attributed to the "Commission's wrong-headedness." *Id.*, at 312. Professor Edwards' observations about the merits of the statute and about prosecutorial discretion are obviously irrelevant to our own inquiry. Unlike scholarly commentators, we have a duty to be faithful to congressional intent when interpreting statutes and are not free to consider whether, or how, the statute should be rewritten.

[28] "In practice, the competitive effects requirement permits a supplier to quote different prices between different distributor classes—so long as those who are higher up (nearer the supplier) on the distribution ladder pay *less* than those who are further down (nearer the consumer)." F. Rowe, Price Discrimination Under the Robinson-Patman Act 174 (1962) (footnote omitted) (hereinafter Rowe); see also *id.*, at 178.

[29] Rowe, writing prior to this Court's *Perkins* decision, describes the exception, which he identifies with the *Standard Oil* cases, as "of dubious validity today." Rowe 196. Rowe's analysis is flawed because he assumes that seller liability for tertiary line implications of wholesaler discounts must follow the logic of the *Standard Oil* complaint, and likewise assumes that this logic exposes to liability any seller who fails to monitor the resale prices of its wholesaler. Rowe 204. Indeed, Rowe's own discussion suggests one defect in his argument: Legitimate wholesaler discounts will usually be insulated from liability by an absence of evidence on the causation issue. *Id.*, at 203–204. In any event, nothing in our opinion today endorses a theory of liability under the Robinson-Patman Act for functional discounts so broad as the theory Rowe draws from *Standard Oil*.

rests more squarely than do most functional discount cases upon direct evidence of the seller's intent to pass a price advantage through an intermediary. This difference, however, hardly cuts in Texaco's favor. In any event, the evidence produced by respondents also shows the scrambled functions which have more frequently signaled the illegitimacy under the Act of what is alleged to be a permissible functional discount. Both Gull and Dompier received the full discount on all their purchases even though most of their volume was resold directly to consumers. The extra margin on those sales obviously enabled them to price aggressively in both their retail and their wholesale marketing. To the extent that Dompier and Gull competed with respondents in the retail market, the presumption of adverse effect on competition recognized in the *Morton Salt* case becomes all the more appropriate. Their competitive advantage in that market also constitutes evidence tending to rebut any presumption of legality that would otherwise apply to their wholesale sales.

The evidence indicates, moreover, that Texaco affirmatively encouraged Dompier to expand its retail business and that Texaco was fully informed about the persistent and marketwide consequences of its own pricing policies. Indeed, its own executives recognized that the dramatic impact on the market was almost entirely attributable to the magnitude of the distributor discount and the hauling allowance. Yet at the same time that Texaco was encouraging Dompier to integrate downward, and supplying Dompier with a generous discount useful to such integration, Texaco was inhibiting upward integration by the respondents: Two of the respondents sought permission from Texaco to haul their own fuel using their own tank wagons, but Texaco refused. The special facts of this case thus make it peculiarly difficult for Texaco to claim that it is being held liable for the independent pricing decisions of Gull or Dompier.

As we recognized in *Falls City Industries*, "the competitive injury component of a Robinson-Patman Act violation is not limited to the injury to competition between the favored and the disfavored purchaser; it also encompasses the injury to competition between their customers." 460 U. S., at 436. This conclusion is compelled by the statutory language, which specifically encompasses not only the adverse effect of price discrimination on persons who either grant or knowingly receive the benefit of such discrimination, but also on "customers of either of them." Such indirect competitive effects surely may not be presumed automatically in every functional discount setting, and, indeed, one would expect that most functional discounts will be legitimate discounts which do not cause harm to competition. At the least, a functional discount that constitutes a reasonable reimbursement for the purchasers' actual marketing functions will not violate the Act. When a functional discount is legitimate, the inference of injury to competition recognized in the *Morton Salt* case will simply not arise. Yet it is also true that not every functional discount is entitled to a judgment of legitimacy, and that it will sometimes be possible to produce evidence showing that a particular functional discount caused a price discrimination of the sort the Act prohibits. When such anticompetitive effects are proved—as we believe they were in this case—they are covered by the Act.[30]

VI

At the trial respondents introduced evidence describing the diversion of their customers to specific stations supplied by Dompier. Respondents' expert testimony on damages also focused on the diversion of trade to specific Dompier-supplied stations. The expert testimony analyzed the entire

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[30] The parties do not raise, and we therefore need not address, the question whether the inference of injury to competition might also be negated by evidence that disfavored buyers could make purchases at a reasonable discount from favored buyers.

damages period, which ran from 1972 and 1981 and included a period prior to 1974 when Dompier did not own any retail stations (although the jury might reasonably have found that Dompier controlled the Red Carpet stations owned by its president from the outset of the damages period). Moreover, respondents offered no direct testimony of any diversion to Gull and testified that they did not even know that Gull was being supplied by Texaco. Texaco contends that by basing the damages award upon an extrapolation from data applicable to Dompier-supplied stations, respondents necessarily based the award upon the consequences of pricing decisions made by independent customers of Dompier. Texaco argues that the damages award must therefore be judged excessive as a matter of law.

Even if we were to agree with Texaco that Dompier was not a retailer throughout the damages period, we could not accept Texaco's argument. Texaco's theory improperly blurs the distinction between the liability and the damages issues. The proof established that Texaco's lower prices to Gull and Dompier were discriminatory throughout the entire 9-year period; that at least Gull, and apparently Dompier as well, was selling at retail during that entire period; that the discounts substantially affected competition throughout the entire market; and that they injured each of the respondents. There is no doubt that respondents' proof of a continuing violation of the Act throughout the 9-year period was sufficient. Proof of the specific amount of their damages was necessarily less precise. Even if some portion of some of respondents' injuries may be attributable to the conduct of independent retailers, the expert testimony nevertheless provided a sufficient basis for an acceptable estimate of the amount of damages. We have held that a plaintiff may not recover damages merely by showing a violation of the Act; rather, the plaintiff must also "make some showing of actual injury attributable to something the antitrust laws were designed to prevent. *Perkins* v. *Standard Oil Co.*, 395 U. S.

642, 648 (1969) (plaintiff 'must, of course, be able to show a causal connection between the price discrimination in violation of the Act and the injury suffered')." *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U. S., at 562. At the same time, however, we reaffirmed our "traditional rule excusing antitrust plaintiffs from an unduly rigorous standard of proving antitrust injury." *Id.*, at 565. See also *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 123–124 (1969); *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251, 264–265 (1946).[31] Moreover, as we have noted, Texaco did not object to the instructions to the jury on the damages issue. A possible flaw in the jury's calculation of the amount of damages would not be an appropriate basis for granting Texaco's motion for a judgment notwithstanding the verdict.

The judgment is affirmed.

It is so ordered.

JUSTICE WHITE, concurring in the result.

Texaco's first submission urging a blanket exemption for all functional discounts is rejected by the Court on the ground stated in *FTC* v. *Anheuser-Busch, Inc.*, 363 U. S. 536, 550 (1960), that the "statute itself spells out the conditions which make a price difference illegal or legal, and we would derange

[31] In *J. Truett Payne*, 451 U. S., at 565–566, we quoted with approval the following passage:

"[D]amage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the factfinder may 'conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs.' *Bigelow* v. *RKO Pictures, Inc.*, [327 U. S.], at 264. See also *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359, 377–379 (1927); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 561–566 (1931)." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S., at 123–124.

this integrated statutory scheme" by providing a defense not contained in the statute. In the next section of its opinion, however, the Court not only declares that a price differential that merely accords due recognition and reimbursement for actual marketing functions does not trigger the presumption of an injury to competition, see *FTC* v. *Morton Salt Co.*, 334 U. S. 37, 46–47 (1948), but also announces that "[s]uch a discount is not illegal." *Ante*, at 562. There is nothing in the Act to suggest such a defense to a charge of price discrimination that "may . . . substantially . . . lessen competition . . . in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." 15 U. S. C. § 13(a). Nor is there any indication in prior cases that the Act should be so construed. The Court relies heavily on the Report of the Attorney General's National Committee to Study the Antitrust Laws (1955) and also suggests that the Federal Trade Commission permits "legitimate functional discounts" but will not countenance subterfuges. *Ante*, at 563.

Thus, a Texaco retailer charged a higher price than a distributor who is given what the Court would call a legitimate discount is entirely foreclosed, even though he offers to prove, and could prove, that the distributor sells to his customers at a price lower than the plaintiff retailer pays Texaco and that those customers of the distributor undersell the plaintiff and have caused plaintiff's business to fail. This kind of injury to the Texaco retailer's ability to compete is squarely covered by the language of § 13(a), which reaches not only injury to competition but injury to Texaco retail customers' ability to compete with the distributor's customers. The Court neither explains why this is not the case nor justifies its departure from the provisions of the Act other than by suggesting that when there is a legitimate discount, it is the distributor's decision, not the discount given by Texaco, that causes the injury, even though the latter makes possible the

distributor's discount. Perhaps this is the case if the concept of a legitimate price discrimination other than those legitimated by the Act's provisions is to be implied. But that poses the question whether the Act is open to such a construction.

The Attorney General's Committee noted the difficulty. Under the construction of the Act that the Federal Trade Commission (FTC or Commission) was then espousing and applying, see *Standard Oil Co.* v. *FTC*, 173 F. 2d 210 (CA7 1949), rev'd on other grounds, 340 U. S. 231 (1951), the Committee said, "[a] supplier according functional discounts to a wholesaler and other middleman while at the same time marketing directly to retailers encounters serious legal risks." Report of Attorney General's National Committee, at 206. The Committee clearly differed with the FTC and called for an authoritative construction of the Act that would accommodate "functional discounts to the broader purposes of the Act and of antitrust policy." *Id.*, at 208. At a later stage in the *Standard Oil* case, the FTC disavowed any purpose to eliminate legitimate functional pricing or to make sellers responsible for the pricing practices of its wholesalers. The reversal of its position, which the Court of Appeals for the Seventh Circuit had affirmed, was explained on the ground of "broader antitrust policies." Reply Brief for Petitioner in *FTC* v. *Standard Oil Co.*, O. T. 1957, No. 24, p. 32. The FTC also appears as an *amicus* in this case urging us to recognize and define legitimate functional discounts. Its brief, however, does not spell out the types of functional discounts that the Commission considers defensible. Nor does the FTC cite any case since the filing of its reply brief in 1957 in which it has purported to describe the contours of legitimate functional pricing. Furthermore, the FTC's argument apparently does not persuade the Court, for the Commission recommends reversal and remand, while the Court affirms the judgment.

In the absence of congressional attention to this long-standing issue involving antitrust policy, I doubt that at this late date we should attempt to set the matter right, at least not in a case that does not require us to define what a legitimate functional discount is. If the FTC now recognizes that functional discounts given by a producer who sells both to distributors and retailers are legitimate if they reflect only proper factors and are not subterfuges, I would await a case challenging such a ruling by the FTC. We would then be reviewing a construction of the Act by the FTC and its explanation of legitimate functional discount pricing.

This is obviously not such a case. This is a private action for treble damages, and the Court rules against the seller-discounter since under no definition of a legitimate functional discount do the discounts extended here qualify as a defense to a charge of price discrimination. We need do no more than the Court did in *Perkins* v. *Standard Oil Co. of Cal.*, 395 U. S. 642 (1969). This the Court plainly recognizes, and it should stop there. Hence, I concur in the result.

JUSTICE SCALIA, with whom JUSTICE KENNEDY joins, concurring in the judgment.

I agree with the Court that none of the arguments pressed by petitioner for removing its conduct from the coverage of the Robinson-Patman Act is persuasive. I cannot, however, adopt the Court's reasoning, which seems to create an exemption for functional discounts that are "reasonable" even though prohibited by the text of the Act.

The Act provides:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent

> competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered." 15 U. S. C. § 13(a).

As the Court notes, *ante*, at 556, sales of like goods in interstate commerce violate this provision if three conditions are met: (1) the seller discriminates in price between purchasers, (2) the effect of such discrimination may be to injure competition between the victim and beneficiaries of the discrimination or their customers, and (3) the discrimination is not cost based. Petitioner makes three arguments, one related to each of these conditions. First, petitioner argues that a price differential between purchasers at different levels of distribution is not discrimination in price. As the Court correctly concludes, that cannot be so. As long ago as *FTC* v. *Morton Salt Co.*, 334 U. S. 37 (1948), we held that the Act prohibits differentials in the prices offered to wholesalers and retailers. True, in *Morton Salt* the retailers were being favored over the wholesalers, the reverse of the situation here. But if that factor could make any difference, it would bear not upon whether price discrimination occurred, but upon whether it affected competition, the point I address next.

Second, petitioner argues that its practice of giving wholesalers Gull and Dompier discounts unavailable to retailer Hasbrouck could not have injured Hasbrouck's competition with retailers who purchased from Gull and Dompier. Any competitive advantage enjoyed by the competing retailers, petitioner asserts, was the product of independent decisions by Gull and Dompier to pass on the discounts to those retailers. This also is unpersuasive. The Act forbids price discrimination whose effect may be "to injure, destroy, or

prevent competition with any person who . . . knowingly receives the benefit of such discrimination, *or with customers* of [that person]." 15 U. S. C. § 13(a) (emphasis added). Obviously, that effect upon "competition with customers" occurs whether or not the beneficiary's choice to pass on the discount is his own. The existence of an implied "proximate cause" requirement that would cut off liability by reason of the voluntary act of passing on is simply implausible. This field is laden with "voluntary acts" of third persons that do not relieve the violator of liability—beginning with the act of the ultimate purchaser, who in the last analysis causes the injury to competition by "voluntarily" choosing to buy from the seller who offers the lower price that the price discrimination has made possible. The Act focuses not upon free will, but upon predictable commercial motivation; and it is just as predictable that a wholesaler will ordinarily increase sales (and thus profits) by passing on at least some of a price advantage, as it is that a retailer will ordinarily buy at the lower price. To say that when the Act refers to injury of competition "with customers" of the beneficiary it has in mind only those customers to whom the beneficiary is *compelled* to sell at the lower price is to assume that Congress focused upon the damage caused by the rare exception rather than the damage caused by the almost universal rule. The Court rightly rejects that interpretation. The independence of the pass-on decision is beside the point.

Petitioner's third point *relates* to the third condition of liability (*i. e.*, lack of a cost justification for the discrimination), but does not assert that such a justification is present here. Rather, joined by the United States as *amicus curiae*, petitioner argues at length that even if petitioner's discounts to Gull and Dompier cannot be shown to be cost based they should be exempted, because the "functional discount" is an efficient and legitimate commercial practice that is ordinarily cost based, though it is all but impossible to establish

cost justification in a particular case. The short answer to this argument is that it should be addressed to Congress.

The Court does not, however, provide that response, but accepts this last argument in somewhat modified form. Petitioner has violated the Act, it says, only because the discount it gave to Gull and Dompier was not a "reasonable reimbursement for the value to [petitioner] of their actual marketing functions." *Ante*, at 562; see also *ante*, at 570. Relying on a mass of extratextual materials, the Court concludes that the Act permits such "reasonable" functional discounts even if the supplier cannot satisfy the "rigorous requirements of the cost justification defense." *Ante*, at 561. I find this conclusion quite puzzling. The language of the Act is straightforward: Any price discrimination whose effect "may be substantially . . . to injure, destroy, or prevent competition" is prohibited, unless it is immunized by the "cost justification" defense, *i. e.*, unless it "make[s] only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which [the] commodities are . . . sold or delivered." 15 U. S. C. § 13(a). There is no exception for "reasonable" functional discounts that do not meet this requirement. Indeed, I am at a loss to understand what *makes* a functional discount "reasonable" *unless* it meets this requirement. It does not have to meet it penny for penny, of course: The "rigorous requirements of the cost justification defense" to which the Court refers, *ante*, at 561, are not the rigors of mathematical precision, but the rigors of *proof* that the amount of the discount and the amount of the cost saving are close enough that the difference cannot produce any *substantial* lessening of competition. See *ante*, at 561–562, n. 18. How is one to determine that a functional discount is "reasonable" except by proving (through the normally, alas, "rigorous" means) that it meets this test? Shall we use a nationwide average?

I suppose a functional discount can be "reasonable" (in the relevant sense of being unlikely to subvert the purposes of

the Act) if it is not commensurate with the supplier's costs *saved* (as the cost justification defense requires), but is commensurate with the wholesaler's costs *incurred* in performing services for the supplier. Such a discount would not produce the proscribed effect upon competition, since if it constitutes only reimbursement for the wholesaler one would not expect him to pass it on. The relevant measure of the discount in order to determine "reasonableness" on that basis, however, is not the measure the Court applies to Texaco ("value to [the supplier] of [the distributor's] actual marketing functions," *ante*, at 562), but rather "cost to the distributor of the distributor's actual marketing functions"—which is of course not necessarily the same thing. I am therefore quite unable to understand what the Court has in mind by its "reasonable" functional discount that is not cost justified.

To my mind, there is one plausible argument for the proposition that a functional basis for differential pricing *ipso facto*—cost justification or not—negates the probability of competitive injury, thus destroying an element of the plaintiff's prima facie case, see *Falls City Industries, Inc.* v. *Vanco Beverage, Inc.*, 460 U. S. 428, 434 (1983): In a market that is really functionally divided, retailers are in competition with one another, not with wholesalers. That competition among retailers cannot be injured by the supplier's giving lower prices to wholesalers—because if the price differential is passed on, all retailers will simply purchase from wholesalers instead of from the supplier. Or, to put it differently, when the market is functionally divided all competing retailers have the opportunity of obtaining the same price from wholesalers, and the supplier's functional price discrimination alone does not cause any injury to competition. Therefore (the argument goes), if functional division of the market is established, it should be up to the complaining retailer to show that some special factor (*e. g.*, an agreement between the supplier and the wholesaler that the latter will not sell to the former's retailer-customers) prevents this normal market

mechanism from operating. As the Court notes, *ante*, at 571, n. 30, this argument was not raised by the parties here or below, and it calls forth a number of issues that would benefit from briefing and factual development. I agree that we should not decide the merit of this argument in the first instance.

For the foregoing reasons, I concur in the judgment.

PENNSYLVANIA *v.* MUNIZ

CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

No. 89–213. Argued February 27, 1990—Decided June 18, 1990

Respondent Muniz was arrested for driving while under the influence of alcohol on a Pennsylvania highway. Without being advised of his rights under *Miranda* v. *Arizona*, 384 U. S. 436, he was taken to a booking center where, as was the routine practice, he was told that his actions and voice would be videotaped. He then answered seven questions regarding his name, address, height, weight, eye color, date of birth, and current age, stumbling over two responses. He was also asked, and was unable to give, the date of his sixth birthday. In addition, he made several incriminating statements while he performed physical sobriety tests and when he was asked to submit to a breathalyzer test. He refused to take the breathalyzer test and was advised, for the first time, of his *Miranda* rights. Both the video and audio portions of the tape were admitted at trial, and he was convicted. His motion for a new trial on the ground that the court should have excluded, *inter alia*, the videotape was denied. The Pennsylvania Superior Court reversed. While finding that the videotape of the sobriety testing exhibited physical rather than testimonial evidence within the meaning of the Fifth Amendment, the court concluded that Muniz's answers to questions and his other verbalizations were testimonial and, thus, the audio portion of the tape should have been suppressed in its entirety.

Held: The judgment is vacated and remanded.

377 Pa. Super. 382, 547 A. 2d 419, vacated and remanded.

JUSTICE BRENNAN delivered the opinion of the Court with respect to Parts I, II, III–A, III–B, and IV, concluding that only Muniz's response to the sixth birthday question constitutes a testimonial response to custodial interrogation for purposes of the Self-Incrimination Clause of the Fifth Amendment. Pp. 588–600, 602–605.

(a) The privilege against self-incrimination protects an "accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature," *Schmerber* v. *California*, 384 U. S. 757, 761, but not from being compelled by the State to produce "real or physical evidence," *id.*, at 764. To be testimonial, the communication must, "explicitly or implicitly, relate a factual assertion or disclose information." *Doe* v. *United States*, 487 U. S. 201, 210. Pp. 588–590.

(b) Muniz's answers to direct questions are not rendered inadmissible by *Miranda* merely because the slurred nature of his speech was incriminating. Under *Schmerber* and its progeny, any slurring of speech and other evidence of lack of muscular coordination revealed by his responses constitute nontestimonial components of those responses. Requiring a suspect to reveal the physical manner in which he articulates words, like requiring him to reveal the physical properties of the sound of his voice by reading a transcript, see *United States* v. *Dionisio*, 410 U. S. 1, does not, without more, compel him to provide a "testimonial" response for purposes of the privilege. Pp. 590–592.

(c) However, Muniz's response to the sixth birthday question was incriminating not just because of his delivery, but also because the *content* of his answer supported an inference that his mental state was confused. His response was testimonial because he was required to communicate an express or implied assertion of fact or belief and, thus, was confronted with the "trilemma" of truth, falsity, or silence, the historical abuse against which the privilege against self-incrimination was aimed. By hypothesis, the custodial interrogation's inherently coercive environment precluded the option of remaining silent, so he was left with the choice of incriminating himself by admitting the truth that he did not then know the date of his sixth birthday, or answering untruthfully by reporting a date that he did not know was accurate (which would also have been incriminating). Since the state court's holdings that the sixth birthday question constituted an unwarned interrogation and that Muniz's answer was incriminating were not challenged, this testimonial response should have been suppressed. Pp. 592–600.

(d) Muniz's incriminating utterances during the sobriety and breathalyzer tests were not prompted by an interrogation within the meaning of *Miranda* and should not have been suppressed. The officer's dialogue with Muniz concerning the physical sobriety tests consisted primarily of carefully scripted instructions as to how the tests were to be performed that were not likely to be perceived as calling for any verbal response. Therefore, they were not "words or actions" constituting custodial interrogation, and Muniz's incriminating utterances were "voluntary." The officer administering the breathalyzer test also carefully limited her role to providing Muniz with relevant information about the test and the implied consent law. She questioned him only as to whether he understood her instructions and wished to submit to the test. These limited and focused inquiries were necessarily "attendant to" a legitimate police procedure and were not likely to be perceived as calling for any incriminating response. Pp. 602–605.

JUSTICE BRENNAN, joined by JUSTICE O'CONNOR, JUSTICE SCALIA, and JUSTICE KENNEDY, concluded in Part III–C that the first seven

questions asked Muniz fall outside *Miranda* protections and need not be suppressed. Although they constituted custodial interrogation, see *Rhode Island* v. *Innis*, 446 U. S. 291, they are nonetheless admissible because the questions were asked "for record-keeping purposes only," and therefore they fall within a "routine booking question" exception which exempts from *Miranda*'s coverage questions to secure the "biographical data necessary to complete booking or pretrial services," *United States* v. *Horton*, 873 F. 2d 180, 181, n. 2. Pp. 600–602.

THE CHIEF JUSTICE, joined by JUSTICE WHITE, JUSTICE BLACKMUN, and JUSTICE STEVENS, concluded that Muniz's responses to the "booking" questions were not testimonial and therefore do not warrant application of the privilege. P. 608.

BRENNAN, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–A, and IV, in which REHNQUIST, C. J., and WHITE, BLACKMUN, STEVENS, O'CONNOR, SCALIA, and KENNEDY, JJ., joined, the opinion of the Court with respect to Part III–B, in which MARSHALL, O'CONNOR, SCALIA, and KENNEDY, JJ., joined, and an opinion with respect to Part III–C, in which O'CONNOR, SCALIA, and KENNEDY, JJ., joined. REHNQUIST, C. J., filed an opinion concurring in part, concurring in the result in part, and dissenting in part, in which WHITE, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 606. MARSHALL, J., filed an opinion concurring in part and dissenting in part, *post*, p. 608.

J. Michael Eakin argued the cause and filed a brief for petitioner.

Richard F. Maffett, Jr., argued the cause and filed a brief for respondent.*

JUSTICE BRENNAN delivered the opinion of the Court, except as to Part III–C.

We must decide in this case whether various incriminating utterances of a drunken-driving suspect, made while performing a series of sobriety tests, constitute testimonial responses to custodial interrogation for purposes of the Self-Incrimination Clause of the Fifth Amendment.

**Solicitor General Starr, Assistant Attorney General Dennis, Deputy Solicitor General Bryson*, and *Christopher J. Wright* filed a brief for the United States as *amicus curiae* urging reversal.

I

During the early morning hours of November 30, 1986, a patrol officer spotted respondent Inocencio Muniz and a passenger parked in a car on the shoulder of a highway. When the officer inquired whether Muniz needed assistance, Muniz replied that he had stopped the car so he could urinate. The officer smelled alcohol on Muniz's breath and observed that Muniz's eyes were glazed and bloodshot and his face was flushed. The officer then directed Muniz to remain parked until his condition improved, and Muniz gave assurances that he would do so. But as the officer returned to his vehicle, Muniz drove off. After the officer pursued Muniz down the highway and pulled him over, the officer asked Muniz to perform three standard field sobriety tests: a "horizontal gaze nystagmus" test, a "walk and turn" test, and a "one leg stand" test.[1] Muniz performed these tests poorly, and he informed the officer that he had failed the tests because he had been drinking.

The patrol officer arrested Muniz and transported him to the West Shore facility of the Cumberland County Central Booking Center. Following its routine practice for receiving persons suspected of driving while intoxicated, the booking center videotaped the ensuing proceedings. Muniz was informed that his actions and voice were being recorded, but he

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[1] The "horizontal gaze nystagmus" test measures the extent to which a person's eyes jerk as they follow an object moving from one side of the person's field of vision to the other. The test is premised on the understanding that, whereas everyone's eyes exhibit some jerking while turning to the side, when the subject is intoxicated "the onset of the jerking occurs after fewer degrees of turning, and the jerking at more extreme angles becomes more distinct." 1 R. Erwin et al., Defense of Drunk Driving Cases § 8A.99, pp. 8A–43, 8A–45 (1989). The "walk and turn" test requires the subject to walk heel to toe along a straight line for nine paces, pivot, and then walk back heel to toe along the line for another nine paces. The subject is required to count each pace aloud from one to nine. The "one leg stand" test requires the subject to stand on one leg with the other leg extended in the air for 30 seconds, while counting aloud from 1 to 30.

was not at this time (nor had he been previously) advised of his rights under *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Officer Hosterman first asked Muniz his name, address, height, weight, eye color, date of birth, and current age. He responded to each of these questions, stumbling over his address and age. The officer then asked Muniz, "Do you know what the date was of your sixth birthday?" After Muniz offered an inaudible reply, the officer repeated, "When you turned six years old, do you remember what the date was?" Muniz responded, "No, I don't."

Officer Hosterman next requested Muniz to perform each of the three sobriety tests that Muniz had been asked to perform earlier during the initial roadside stop. The videotape reveals that his eyes jerked noticeably during the gaze test, that he did not walk a very straight line, and that he could not balance himself on one leg for more than several seconds. During the latter two tests, he did not complete the requested verbal counts from 1 to 9 and from 1 to 30. Moreover, while performing these tests, Muniz "attempted to explain his difficulties in performing the various tasks, and often requested further clarification of the tasks he was to perform." 377 Pa. Super. 382, 390, 547 A. 2d 419, 423 (1988).

Finally, Officer Deyo asked Muniz to submit to a breathalyzer test designed to measure the alcohol content of his expelled breath. Officer Deyo read to Muniz the Commonwealth's Implied Consent Law, 75 Pa. Cons. Stat. § 1547 (1987), and explained that under the law his refusal to take the test would result in automatic suspension of his driver's license for one year. Muniz asked a number of questions about the law, commenting in the process about his state of inebriation. Muniz ultimately refused to take the breath test. At this point, Muniz was for the first time advised of his *Miranda* rights. Muniz then signed a statement waiving his rights and admitted in response to further questioning that he had been driving while intoxicated.

Both the video and audio portions of the videotape were admitted into evidence at Muniz's bench trial,[2] along with the arresting officer's testimony that Muniz failed the roadside sobriety tests and made incriminating remarks at that time. Muniz was convicted of driving under the influence of alcohol in violation of 75 Pa. Cons. Stat. § 3731(a)(1) (1987). Muniz filed a motion for a new trial, contending that the court should have excluded the testimony relating to the field sobriety tests and the videotape taken at the booking center "because they were incriminating and completed prior to [Muniz's] receiving his Miranda warnings." App. to Pet. for Cert. C–5—C–6. The trial court denied the motion, holding that "'requesting a driver, suspected of driving under the influence of alcohol, to perform physical tests or take a breath analysis does not violate [his] privilege against self-incrimination because [the] evidence procured is of a physical nature rather than testimonial, and therefore no Miranda warnings are required.'" *Id.*, at C–6, quoting *Commonwealth* v. *Benson*, 280 Pa. Super. 20, 29, 421 A. 2d 383, 387 (1980).

On appeal, the Superior Court of Pennsylvania reversed. The appellate court agreed that when Muniz was asked "to submit to a field sobriety test, and later perform these tests before the videotape camera, no *Miranda* warnings were required" because such sobriety tests elicit physical, rather than testimonial, evidence within the meaning of the Fifth Amendment. 377 Pa. Super., at 387, 547 A. 2d, at 422. The court concluded, however, that "when the physical nature of the tests begins to yield testimonial and communicative statements . . . the protections afforded by *Miranda* are invoked." *Ibid.* The court explained that Muniz's answer to the question regarding his sixth birthday and the statements and inquiries he made while performing the phys-

[2] There was a 14-minute delay between the completion of the physical sobriety tests and the beginning of the breathalyzer test. During this period, Muniz briefly engaged in conversation with Officer Hosterman. This 14-minute segment of the videotape was not shown at trial. App. 29.

ical dexterity tests and discussing the breathalyzer test "are precisely the sort of testimonial evidence that we expressly protected in [previous cases]," *id.*, at 390, 547 A. 2d, at 423, because they "'reveal[ed] his thought processes.'" *Id.*, at 389, 547 A. 2d, at 423. The court further explained: "[N]one of Muniz's utterances were spontaneous, voluntary verbalizations. Rather, they were clearly compelled by the questions and instructions presented to him during his detention at the Booking Center. Since the . . . responses and communications were elicited before Muniz received his *Miranda* warnings, they should have been excluded as evidence." *Id.*, at 390, 547 A. 2d, at 423.[3] Concluding that the audio portion of the videotape should have been suppressed in its entirety, the court reversed Muniz's conviction and remanded the case for a new trial.[4] After the Pennsylvania Supreme Court denied the Commonwealth's application for review, 522 Pa. 575, 559 A. 2d 36 (1989), we granted certiorari. 493 U. S. 916 (1989).

II

The Self-Incrimination Clause of the Fifth Amendment[5] provides that no "person . . . shall be compelled in any criminal case to be a witness against himself." Although the text does not delineate the ways in which a person might be made

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[3] The court did not suppress Muniz's verbal admissions to the arresting officer during the roadside tests, ruling that Muniz was not taken into custody for purposes of *Miranda* until he was arrested after the roadside tests were completed. See *Pennsylvania* v. *Bruder*, 488 U. S. 9 (1988).

[4] The Superior Court's opinion refers to Art. 1, § 9, of the Pennsylvania Constitution but explains that this provision "'offers a protection against self-incrimination identical to that provided by the Fifth Amendment.'" 377 Pa. Super., at 386, 547 A. 2d, at 421 (quoting *Commonwealth* v. *Conway*, 368 Pa. Super. 488, 498, 534 A. 2d 541, 546 (1987)). The decision therefore does not rest on an independent and adequate state ground. See *Michigan* v. *Long*, 463 U. S. 1032 (1983).

[5] In *Malloy* v. *Hogan*, 378 U. S. 1 (1964), we held the privilege against self-incrimination applicable to the States through the Fourteenth Amendment.

a "witness against himself," cf. *Schmerber* v. *California*, 384 U. S. 757, 761–762, n. 6 (1966), we have long held that the privilege does not protect a suspect from being compelled by the State to produce "real or physical evidence." *Id.*, at 764. Rather, the privilege "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." *Id.*, at 761. "[I]n order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a 'witness' against himself." *Doe* v. *United States*, 487 U. S. 201, 210 (1988).

In *Miranda* v. *Arizona*, 384 U. S. 436 (1966), we reaffirmed our previous understanding that the privilege against self-incrimination protects individuals not only from legal compulsion to testify in a criminal courtroom but also from "informal compulsion exerted by law-enforcement officers during in-custody questioning." *Id.*, at 461. Of course, voluntary statements offered to police officers "remain a proper element in law enforcement." *Id.*, at 478. But "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.*, at 467. Accordingly, we held that protection of the privilege against self-incrimination during pretrial questioning requires application of special "procedural safeguards." *Id.*, at 444. "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Ibid.* Unless a suspect "voluntarily, knowingly and intelligently" waives these rights, *ibid.*, any incriminating responses to questioning may not be introduced into evidence in the prosecution's case in chief in a subsequent criminal proceeding.

This case implicates both the "testimonial" and "compulsion" components of the privilege against self-incrimination in the context of pretrial questioning. Because Muniz was not advised of his *Miranda* rights until after the videotaped proceedings at the booking center were completed, any verbal statements that were both testimonial in nature and elicited during custodial interrogation should have been suppressed. We focus first on Muniz's responses to the initial informational questions, then on his questions and utterances while performing the physical dexterity and balancing tests, and finally on his questions and utterances surrounding the breathalyzer test.

III

In the initial phase of the recorded proceedings, Officer Hosterman asked Muniz his name, address, height, weight, eye color, date of birth, current age, and the date of his sixth birthday. Both the delivery and content of Muniz's answers were incriminating. As the state court found, "Muniz's videotaped responses . . . certainly led the finder of fact to infer that his confusion and failure to speak clearly indicated a state of drunkenness that prohibited him from safely operating his vehicle." 377 Pa. Super., at 390, 547 A. 2d, at 423. The Commonwealth argues, however, that admission of Muniz's answers to these questions does not contravene Fifth Amendment principles because Muniz's statement regarding his sixth birthday was not "testimonial" and his answers to the prior questions were not elicited by custodial interrogation. We consider these arguments in turn.

A

We agree with the Commonwealth's contention that Muniz's answers are not rendered inadmissible by *Miranda* merely because the slurred nature of his speech was incriminating. The physical inability to articulate words in a clear manner due to "the lack of muscular coordination of his tongue and mouth," Brief for Petitioner 16, is not itself a tes-

timonial component of Muniz's responses to Officer Hosterman's introductory questions. In *Schmerber* v. *California*, *supra*, we drew a distinction between "testimonial" and "real or physical evidence" for purposes of the privilege against self-incrimination. We noted that in *Holt* v. *United States*, 218 U. S. 245, 252–253 (1910), Justice Holmes had written for the Court that "'[t]he prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material.'" 384 U. S., at 763. We also acknowledged that "both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." *Id.*, at 764. Embracing this view of the privilege's contours, we held that "the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." *Ibid.* Using this "helpful framework for analysis," *ibid.*, we held that a person suspected of driving while intoxicated could be forced to provide a blood sample, because that sample was "real or physical evidence" outside the scope of the privilege and the sample was obtained in a manner by which "[p]etitioner's testimonial capacities were in no way implicated." *Id.*, at 765.

We have since applied the distinction between "real or physical" and "testimonial" evidence in other contexts where the evidence could be produced only through some volitional act on the part of the suspect. In *United States* v. *Wade*, 388 U. S. 218 (1967), we held that a suspect could be compelled to participate in a lineup and to repeat a phrase provided by the police so that witnesses could view him and listen to his voice. We explained that requiring his presence and speech at a lineup reflected "compulsion of the accused to

exhibit his physical characteristics, not compulsion to disclose any knowledge he might have." *Id.*, at 222; see *id.*, at 222–223 (suspect was "required to use his voice as an identifying physical characteristic"). In *Gilbert* v. *California*, 388 U. S. 263 (1967), we held that a suspect could be compelled to provide a handwriting exemplar, explaining that such an exemplar, "in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside [the privilege's] protection." *Id.*, at 266–267. And in *United States* v. *Dionisio*, 410 U. S. 1 (1973), we held that suspects could be compelled to read a transcript in order to provide a voice exemplar, explaining that the "voice recordings were to be used solely to measure the physical properties of the witnesses' voices, not for the testimonial or communicative content of what was to be said." *Id.*, at 7.

Under *Schmerber* and its progeny, we agree with the Commonwealth that any slurring of speech and other evidence of lack of muscular coordination revealed by Muniz's responses to Officer Hosterman's direct questions constitute nontestimonial components of those responses. Requiring a suspect to reveal the physical manner in which he articulates words, like requiring him to reveal the physical properties of the sound produced by his voice, see *Dionisio*, *supra*, does not, without more, compel him to provide a "testimonial" response for purposes of the privilege.

B

This does not end our inquiry, for Muniz's answer to the sixth birthday question was incriminating, not just because of his delivery, but also because of his answer's *content;* the trier of fact could infer from Muniz's answer (that he did not *know* the proper date) that his mental state was confused.[6]

[6] Under Pennsylvania law, driving under the influence of alcohol consists of driving while intoxicated to a degree "'which substantially impairs [the suspect's] judgment, or clearness of intellect, or any of the normal faculties essential to the safe operation of an automobile.'" *Commonwealth*

The Commonwealth and the United States as *amicus curiae* argue that this incriminating inference does not trigger the protections of the Fifth Amendment privilege because the inference concerns "the physiological functioning of [Muniz's] brain," Brief for Petitioner 21, which is asserted to be every bit as "real or physical" as the physiological makeup of his blood and the timbre of his voice.

But this characterization addresses the wrong question; that the "fact" to be inferred might be said to concern the physical status of Muniz's brain merely describes the way in which the inference is incriminating. The correct question for present purposes is whether the incriminating inference of mental confusion is drawn from a testimonial act or from physical evidence. In *Schmerber*, for example, we held that the police could compel a suspect to provide a blood sample in order to determine the physical makeup of his blood and thereby draw an inference about whether he was intoxicated. This compulsion was outside of the Fifth Amendment's protection, not simply because the evidence concerned the suspect's physical body, but rather because the evidence was *obtained* in a manner that did not entail any testimonial act on the part of the suspect: "Not even a shadow of testimonial compulsion upon or enforced communication by the accused was involved either in the extraction or in the chemical analysis." 384 U. S., at 765. In contrast, had the police instead asked the suspect directly whether his blood contained a high concentration of alcohol, his affirmative response would have been testimonial even though it would have been used to draw the same inference concerning his physiology. See *ibid.* ("[T]he blood test evidence . . . was neither [the suspect's] testimony nor evidence relating to some communicative act"). In this case, the question is not whether a suspect's "impaired mental faculties" can fairly be characterized as an aspect of his physiology, but rather whether Muniz's re-

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v. *Griscavage*, 512 Pa. 540, 545, 517 A. 2d 1256, 1258 (1986) (emphasis deleted).

sponse to the sixth birthday question that gave rise to the inference of such an impairment was testimonial in nature.[7]

We recently explained in *Doe* v. *United States*, 487 U. S. 201 (1988), that "in order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information." *Id.*, at 210. We reached this conclusion after addressing our reasoning in *Schmerber*, *supra*, and its progeny:

> "The Court accordingly held that the privilege was not implicated in [the line of cases beginning with *Schmerber*], because the suspect was not required 'to disclose any knowledge he might have,' or 'to speak his guilt.' *Wade*, 388 U. S., at 222–223. See *Dionisio*, 410 U. S., at 7; *Gilbert*, 388 U. S., at 266–267. It is the 'extortion of information from the accused,' *Couch* v. *United States*, 409 U. S., at 328, the attempt to force him 'to disclose the contents of his own mind,' *Curcio* v. *United States*, 354 U. S. 118, 128 (1957), that implicates the Self-Incrimination Clause. . . . 'Unless some attempt is made to secure a communication—written, oral or otherwise—upon which reliance is to be placed as involving [the accused's] consciousness of the facts and the operations of his mind in expressing it, the demand made upon

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[7] See, *e. g.*, *Doe* v. *United States*, 487 U. S. 201, 211, n. 10 (1988) ("[T]he *Schmerber* line of cases does not draw a distinction between unprotected evidence sought for its physical characteristics and protected evidence sought for its [other] content. Rather, the Court distinguished between the suspect's being compelled himself to *serve as evidence* and the suspect's being compelled to *disclose or communicate information or facts* that might serve as or lead to incriminating evidence") (emphasis added); cf. *Baltimore Dept. of Social Services* v. *Bouknight*, 493 U. S. 549, 555 (1990) (individual compelled to produce document or other tangible item to State "may not claim the [Fifth] Amendment's protections based upon the incrimination that may result from the contents or nature of the thing demanded" but may "clai[m] the benefits of the privilege because the act of production would amount to testimony").

> him is not a testimonial one.' 8 Wigmore § 2265, p. 386." 487 U. S., at 210–211.

After canvassing the purposes of the privilege recognized in prior cases,[8] we concluded that "[t]hese policies are served when the privilege is asserted to spare the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the Government."[9] *Id.*, at 213.

This definition of testimonial evidence reflects an awareness of the historical abuses against which the privilege against self-incrimination was aimed. "Historically, the privilege was intended to prevent the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him. Such was the process of the

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[8] See *Doe*, *supra*, at 212–213 (quoting *Murphy* v. *Waterfront Comm'n of New York Harbor*, 378 U. S. 52, 55 (1964) (internal citations omitted)): "[T]he privilege is founded on 'our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government . . . in its contest with the individual to shoulder the entire load," . . . ; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life," . . . ; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."' "

[9] This definition applies to both verbal and nonverbal conduct; nonverbal conduct contains a testimonial component whenever the conduct reflects the actor's communication of his thoughts to another. See *Doe*, *supra*, at 209–210, and n. 8; *Schmerber* v. *California*, 384 U. S. 757, 761, n. 5 (1966) ("A nod or head-shake is as much a 'testimonial' or 'communicative' act in this sense as are spoken words"); see also *Braswell* v. *United States*, 487 U. S. 99, 122 (1988) (KENNEDY, J., dissenting) ("Those assertions [contained within the act of producing subpoenaed documents] can convey information about that individual's knowledge and state of mind as effectively as spoken statements, and the Fifth Amendment protects individuals from having such assertions compelled by their own acts").

ecclesiastical courts and the Star Chamber—the inquisitorial method of putting the accused upon his oath and compelling him to answer questions designed to uncover uncharged offenses, without evidence from another source. The major thrust of the policies undergirding the privilege is to prevent such compulsion." *Id.*, at 212 (citations omitted); see also *Andresen* v. *Maryland*, 427 U. S. 463, 470–471 (1976). At its core, the privilege reflects our fierce "'unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt,'" *Doe*, 487 U. S., at 212 (citation omitted), that defined the operation of the Star Chamber, wherein suspects were forced to choose between revealing incriminating private thoughts and forsaking their oath by committing perjury. See *United States* v. *Nobles*, 422 U. S. 225, 233 (1975) ("The Fifth Amendment privilege against compulsory self-incrimination . . . protects 'a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation'") (quoting *Couch* v. *United States*, 409 U. S. 322, 327 (1973)).

We need not explore the outer boundaries of what is "testimonial" today, for our decision flows from the concept's core meaning. Because the privilege was designed primarily to prevent "a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality," *Ullmann* v. *United States*, 350 U. S. 422, 428 (1956), it is evident that a suspect is "compelled . . . to be a witness against himself" at least whenever he must face the modern-day analog of the historic trilemma—either during a criminal trial where a sworn witness faces the identical three choices, or during custodial interrogation where, as we explained in *Miranda*, the choices are analogous and hence raise similar concerns.[10] Whatever

[10] During custodial interrogation, the pressure on the suspect to respond flows not from the threat of contempt sanctions, but rather from the "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda* v. *Arizona*, 384 U. S. 436, 467 (1966). Moreover,

else it may include, therefore, the definition of "testimonial" evidence articulated in *Doe* must encompass all responses to questions that, if asked of a sworn suspect during a criminal trial, could place the suspect in the "cruel trilemma." This conclusion is consistent with our recognition in *Doe* that "[t]he vast majority of verbal statements thus will be testimonial" because "[t]here are very few instances in which a verbal statement, either oral or written, will not convey information or assert facts." 487 U. S., at 213. Whenever a suspect is asked for a response requiring him to communicate an express or implied assertion of fact or belief,[11] the suspect confronts the "trilemma" of truth, falsity, or silence, and hence the response (whether based on truth or falsity) contains a testimonial component.

This approach accords with each of our post-*Schmerber* cases finding that a particular oral or written response to express or implied questioning was nontestimonial; the questions presented in these cases did not confront the suspects with this trilemma. As we noted in *Doe*, *supra*, at 210–211, the cases upholding compelled writing and voice exemplars did not involve situations in which suspects were asked to communicate any personal beliefs or knowledge of facts, and therefore the suspects were not forced to choose between

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false testimony does not give rise directly to sanctions (either religious sanctions for lying under oath or prosecutions for perjury), but only indirectly (false testimony might itself prove incriminating, either because it links (albeit falsely) the suspect to the crime or because the prosecution might later prove at trial that the suspect lied to the police, giving rise to an inference of guilty conscience). Despite these differences, however, "[w]e are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning." *Id.*, at 461; see *id.*, at 458 (noting "intimate connection between the privilege against self-incrimination and police custodial questioning").

[11] As we explain *infra*, at 600–601, for purposes of custodial interrogation such a question may be either express, as in this case, or else implied through words or actions reasonably likely to elicit a response.

truthfully or falsely revealing their thoughts. We carefully noted in *Gilbert* v. *California*, 388 U. S. 263 (1967), for example, that a "mere handwriting exemplar, *in contrast to the content of what is written*, like the voice or body itself, is an identifying physical characteristic outside [the privilege's] protection." *Id.*, at 266–267 (emphasis added). Had the suspect been asked to provide a writing sample of his own composition, the content of the writing would have reflected his assertion of facts or beliefs and hence would have been testimonial; but in *Gilbert* "[n]o claim [was] made that the content of the exemplars was testimonial or communicative matter." *Id.*, at 267.[12] And in *Doe*, the suspect was asked merely to sign a consent form waiving a privacy interest in foreign bank records. Because the consent form spoke in the hypothetical and did not identify any particular banks, accounts, or private records, the form neither "communicate[d] any factual assertions, implicit or explicit, [n]or convey[ed] any information to the Government." 487 U. S., at 215. We concluded, therefore, that compelled execution of the consent directive did not "forc[e] [the suspect] to express the contents of his mind," *id.*, at 210, n. 9, but rather forced the suspect only to make a "nonfactual statement." *Id.*, at 213, n. 11.

In contrast, the sixth birthday question in this case required a testimonial response. When Officer Hosterman

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[12] See also *United States* v. *Wade*, 388 U. S. 218, 222–223 (1967) ("[T]o utter words purportedly uttered by the robber [and dictated to the suspect by the police] was not compulsion to utter statements of a 'testimonial' nature; [the suspect] was required to use his voice as an identifying physical characteristic, not to speak his guilt" because the words did not reflect any facts or beliefs asserted by the suspect); *United States* v. *Dionisio*, 410 U. S. 1, 7 (1973) (where suspects were asked to create voice exemplars by reading already-prepared transcripts, the "voice recordings were to be used solely to measure the physical properties of the witnesses' voices, not for the testimonial or communicative content of what was to be said" because the content did not reflect any facts or beliefs asserted by the suspects).

asked Muniz if he knew the date of his sixth birthday and Muniz, for whatever reason, could not remember or calculate that date, he was confronted with the trilemma. By hypothesis, the inherently coercive environment created by the custodial interrogation precluded the option of remaining silent, see n. 10, *supra*. Muniz was left with the choice of incriminating himself by admitting that he did not then know the date of his sixth birthday, or answering untruthfully by reporting a date that he did not then believe to be accurate (an incorrect guess would be incriminating as well as untruthful). The content of his truthful answer supported an inference that his mental faculties were impaired, because his assertion (he did not know the date of his sixth birthday) was different from the assertion (he knew the date was (correct date)) that the trier of fact might reasonably have expected a lucid person to provide. Hence, the incriminating inference of impaired mental faculties stemmed, not just from the fact that Muniz slurred his response, but also from a testimonial aspect of that response.[13]

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[13] The Commonwealth's protest that it had no investigatory interest in the actual date of Muniz's sixth birthday, see Tr. of Oral Arg. 18, is inapposite. The critical point is that the Commonwealth had an investigatory interest in Muniz's assertion of belief that was communicated by his answer to the question. Putting it another way, the Commonwealth may not have cared about the *correct* answer, but it cared about *Muniz's* answer. The incriminating inference stems from the then-existing contents of Muniz's mind as evidenced by his assertion of his knowledge at that time.

This distinction is reflected in *Estelle* v. *Smith*, 451 U. S. 454 (1981), where we held that a defendant's answers to questions during a psychiatric examination were testimonial in nature. The psychiatrist asked a series of questions, some focusing on the defendant's account of the crime. After analyzing both the "statements [the defendant] made, and remarks he omitted," *id.*, at 464, the psychiatrist made a prognosis as to the defendant's "future dangerousness" and testified to this effect at his capital sentencing hearing. The psychiatrist had no investigative interest in whether the defendant's account of the crime and other disclosures were either accurate or complete as a historical matter; rather, he relied on the remarks—both those made and omitted—to infer that the defendant would

The state court held that the sixth birthday question constituted an unwarned interrogation for purposes of the privilege against self-incrimination, 377 Pa. Super., at 390, 547 A. 2d, at 423, and that Muniz's answer was incriminating. *Ibid.* The Commonwealth does not question either conclusion. Therefore, because we conclude that Muniz's response to the sixth birthday question was testimonial, the response should have been suppressed.

C

The Commonwealth argues that the seven questions asked by Officer Hosterman just *prior* to the sixth birthday question—regarding Muniz's name, address, height, weight, eye color, date of birth, and current age—did not constitute custodial interrogation as we have defined the term in *Miranda* and subsequent cases. In *Miranda*, the Court referred to "interrogation" as actual "questioning initiated by law enforcement officers." 384 U. S., at 444. We have since clarified that definition, finding that the "goals of the *Miranda* safeguards could be effectuated if those safeguards extended not only to express questioning, but also to 'its functional equivalent.'" *Arizona* v. *Mauro*, 481 U. S. 520, 526 (1987). In *Rhode Island* v. *Innis*, 446 U. S. 291 (1980), the Court defined the phrase "functional equivalent" of express questioning to include "any words or actions on the part of the police (other than those normally attendant to arrest and custody)

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likely pose a threat to society in the future because of his state of mind. We nevertheless explained that the "Fifth Amendment privilege . . . is directly involved here because the State used as evidence against [the defendant] the *substance of his disclosures* during the pretrial psychiatric examination." *Id.*, at 464–465 (emphasis added). The psychiatrist may have presumed the defendant's remarks to be truthful for purposes of drawing his inferences as to the defendant's state of mind, see *South Dakota* v. *Neville*, 459 U. S. 553, 561–562, n. 12 (1983), but that is true in Muniz's case as well: The incriminating inference of mental confusion is based on the premise that Muniz was responding truthfully to Officer Hosterman's question when he stated that he did not then know the date of his sixth birthday.

that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police." *Id.*, at 301 (footnotes omitted); see also *Illinois* v. *Perkins*, *ante*, at 296. However, "[a]ny knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining" what the police reasonably should have known. *Innis*, *supra*, at 302, n. 8. Thus, custodial interrogation for purposes of *Miranda* includes both express questioning and words or actions that, given the officer's knowledge of any special susceptibilities of the suspect, the officer knows or reasonably should know are likely to "have . . . the force of a question on the accused," *Harryman* v. *Estelle*, 616 F. 2d 870, 874 (CA5 1980), and therefore be reasonably likely to elicit an incriminating response.

We disagree with the Commonwealth's contention that Officer Hosterman's first seven questions regarding Muniz's name, address, height, weight, eye color, date of birth, and current age do not qualify as custodial interrogation as we defined the term in *Innis*, *supra*, merely because the questions were not intended to elicit information for investigatory purposes. As explained above, the *Innis* test focuses primarily upon "the perspective of the suspect." *Perkins*, *ante*, at 296. We agree with *amicus* United States, however, that Muniz's answers to these first seven questions are nonetheless admissible because the questions fall within a "routine booking question" exception which exempts from *Miranda*'s coverage questions to secure the "'biographical data necessary to complete booking or pretrial services.'" Brief for United States as *Amicus Curiae* 12, quoting *United States* v. *Horton*, 873 F. 2d 180, 181, n. 2 (CA8 1989). The state court found that the first seven questions were "requested for record-keeping purposes only," App. B16, and therefore the questions appear reasonably related to the police's adminis-

trative concerns.[14] In this context, therefore, the first seven questions asked at the booking center fall outside the protections of *Miranda* and the answers thereto need not be suppressed.

IV

During the second phase of the videotaped proceedings, Officer Hosterman asked Muniz to perform the same three sobriety tests that he had earlier performed at roadside prior to his arrest: the "horizontal gaze nystagmus" test, the "walk and turn" test, and the "one leg stand" test. While Muniz was attempting to comprehend Officer Hosterman's instructions and then perform the requested sobriety tests, Muniz made several audible and incriminating statements.[15] Muniz argued to the state court that both the videotaped performance of the physical tests themselves and the audiorecorded verbal statements were introduced in violation of *Miranda*.

The court refused to suppress the videotaped evidence of Muniz's paltry performance on the physical sobriety tests, reasoning that "'[r]equiring a driver to perform physical [sobriety] tests . . . does not violate the privilege against self-incrimination because the evidence procured is of a physical nature rather than testimonial.'" 377 Pa. Super., at 387, 547 A. 2d, at 422 (quoting *Commonwealth* v. *Benson*, 280 Pa.

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[14] As *amicus* United States explains, "[r]ecognizing a 'booking exception' to *Miranda* does not mean, of course, that any question asked during the booking process falls within that exception. Without obtaining a waiver of the suspect's *Miranda* rights, the police may not ask questions, even during booking, that are designed to elicit incriminatory admissions." Brief for United States as *Amicus Curiae* 13. See, *e. g.*, *United States* v. *Avery*, 717 F. 2d 1020, 1024–1025 (CA6 1983); *United States* v. *Mata-Abundiz*, 717 F. 2d 1277, 1280 (CA9 1983); *United States* v. *Glen-Archila*, 677 F. 2d 809, 816, n. 18 (CA11 1982).

[15] Most of Muniz's utterances were not clearly discernible, though several of them suggested excuses as to why he could not perform the physical tests under these circumstances.

Super., at 29, 421 A. 2d, at 387).[16] With respect to Muniz's verbal statements, however, the court concluded that "none of Muniz's utterances were spontaneous, voluntary verbalizations," 377 Pa. Super., at 390, 547 A. 2d, at 423, and because they were "elicited before Muniz received his *Miranda* warnings, they should have been excluded as evidence." *Ibid.*

We disagree. Officer Hosterman's dialogue with Muniz concerning the physical sobriety tests consisted primarily of carefully scripted instructions as to how the tests were to be performed. These instructions were not likely to be perceived as calling for any verbal response and therefore were not "words or actions" constituting custodial interrogation, with two narrow exceptions not relevant here.[17] The dialogue also contained limited and carefully worded inquiries as to whether Muniz understood those instructions, but these focused inquiries were necessarily "attendant to" the police

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[16] This conclusion is in accord with that of many other state courts, which have reasoned that standard sobriety tests measuring reflexes, dexterity, and balance do not require the performance of testimonial acts. See, *e. g.*, *Weatherford* v. *State*, 286 Ark. 376, 692 S. W. 2d 605 (1985); *People* v. *Boudreau*, 115 App. Div. 2d 652, 496 N. Y. S. 2d 489 (1985); *Commonwealth* v. *Brennan*, 386 Mass. 772, 438 N. E. 2d 60 (1982); *State* v. *Badon*, 401 So. 2d 1178 (La. 1981); *State* v. *Arsenault*, 115 N. H. 109, 336 A. 2d 244 (1975). Muniz does not challenge the state court's conclusion on this point, and therefore we have no occasion to review it.

[17] The two exceptions consist of Officer Hosterman's requests that Muniz count aloud from 1 to 9 while performing the "walk and turn" test and that he count aloud from 1 to 30 while balancing during the "one leg stand" test. Muniz's counting at the officer's request qualifies as a response to custodial interrogation. However, as Muniz counted accurately (in Spanish) for the duration of his performance on the "one leg stand" test (though he did not complete it), his verbal response to this instruction was not incriminating except to the extent that it exhibited a tendency to slur words, which we have already explained is a nontestimonial component of his response. See *supra*, at 590–592. Muniz did not count during the "walk and turn" test, and he does not argue that his failure to do so has any independent incriminating significance. We therefore need not decide today whether Muniz's counting (or not counting) itself was "testimonial" within the meaning of the privilege.

procedure held by the court to be legitimate. Hence, Muniz's incriminating utterances during this phase of the videotaped proceedings were "voluntary" in the sense that they were not elicited in response to custodial interrogation.[18] See *South Dakota* v. *Neville*, 459 U. S. 553, 564, n. 15 (1983) (drawing analogy to "police request to submit to fingerprinting or photography" and holding that police inquiry whether suspect would submit to blood-alcohol test was not "interrogation within the meaning of *Miranda*").

Similarly, we conclude that *Miranda* does not require suppression of the statements Muniz made when asked to submit to a breathalyzer examination. Officer Deyo read Muniz a prepared script explaining how the test worked, the nature of Pennsylvania's Implied Consent Law, and the legal consequences that would ensue should he refuse. Officer Deyo then asked Muniz whether he understood the nature of the test and the law and whether he would like to submit to the test. Muniz asked Officer Deyo several questions concerning the legal consequences of refusal, which Deyo answered directly, and Muniz then commented upon his state of inebriation. 377 Pa. Super., at 387, 547 A. 2d, at 422. After offering to take the test only after waiting a couple of hours or drinking some water, Muniz ultimately refused.[19]

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[18] We cannot credit the state court's contrary determination that Muniz's utterances (both during this phase of the proceedings and during the next when he was asked to provide a breath sample) were compelled rather than voluntary. 377 Pa. Super., at 390, 547 A. 2d, at 423. The court did not explain how it reached this conclusion, nor did it cite *Innis* or any other case defining custodial interrogation.

[19] Muniz does not and cannot challenge the introduction into evidence of his refusal to submit to the breathalyzer test. In *South Dakota* v. *Neville*, 459 U. S. 553 (1983), we held that since submission to a blood test could itself be compelled, see *Schmerber* v. *California*, 384 U. S. 757 (1966), a State's decision to permit a suspect to refuse to take the test but then to comment upon that refusal at trial did not "compel" the suspect to incriminate himself and hence did not violate the privilege. *Neville*, *supra*, at 562–564. We see no reason to distinguish between chemical blood tests

We believe that Muniz's statements were not prompted by an interrogation within the meaning of *Miranda*, and therefore the absence of *Miranda* warnings does not require suppression of these statements at trial.[20] As did Officer Hosterman when administering the three physical sobriety tests, see *supra*, at 603–604, Officer Deyo carefully limited her role to providing Muniz with relevant information about the breathalyzer test and the Implied Consent Law. She questioned Muniz only as to whether he understood her instructions and wished to submit to the test. These limited and focused inquiries were necessarily "attendant to" the legitimate police procedure, see *Neville*, *supra*, at 564, n. 15, and were not likely to be perceived as calling for any incriminating response.[21]

V

We agree with the state court's conclusion that *Miranda* requires suppression of Muniz's response to the question regarding the date of his sixth birthday, but we do not agree that the entire audio portion of the videotape must be suppressed.[22] Accordingly, the court's judgment reversing

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and breathalyzer tests for these purposes. Cf. *Schmerber*, *supra*, at 765–766, n. 9.

[20] We noted in *Schmerber* that "there may be circumstances in which the pain, danger, or severity of an operation [or other test seeking physical evidence] would almost inevitably cause a person to prefer confession to undergoing the 'search,'" 384 U. S., at 765, n. 9, and in such cases "[i]f it wishes to compel persons to submit to such attempts to discover evidence, the State may have to forgo the advantage of any *testimonial* products of administering the test." *Ibid.* See also *Neville*, *supra*, at 563 ("Fifth Amendment may bar the use of testimony obtained when the proffered alternative was to submit to a test so painful, dangerous, or severe, or so violative of religious beliefs, that almost inevitably a person would prefer 'confession'"). But Muniz claims no such extraordinary circumstance here.

[21] See n. 18, *supra*.

[22] The parties have not asked us to decide whether any error in this case was harmless. The state court is free, of course, to consider this question upon remand.

Muniz's conviction is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE WHITE, JUSTICE BLACKMUN, and JUSTICE STEVENS join, concurring in part, concurring in the result in part, and dissenting in part.

I join Parts I, II, III–A, and IV of the Court's opinion. In addition, although I agree with the conclusion in Part III–C that the seven "booking" questions should not be suppressed, I do so for a reason different from that of JUSTICE BRENNAN. I dissent from the Court's conclusion that Muniz's response to the "sixth birthday question" should have been suppressed.

The Court holds that the sixth birthday question Muniz was asked required a testimonial response, and that its admission at trial therefore violated Muniz's privilege against compulsory self-incrimination. The Court says:

> "When Officer Hosterman asked Muniz if he knew the date of his sixth birthday and Muniz, for whatever reason, could not remember or calculate that date, he was confronted with the trilemma [*i. e.*, the '"trilemma" of truth, falsity, or silence,' see *ante*, at 597]. . . . Muniz was left with the choice of incriminating himself by admitting that he did not then know the date of his sixth birthday, or answering untruthfully by reporting a date that he did not then believe to be accurate (an incorrect guess would be incriminating as well as untruthful)." *Ante*, at 598-599.

As an assumption about human behavior, this statement is wrong. Muniz would no more have felt compelled to fabricate a false date than one who cannot read the letters on an eye chart feels compelled to fabricate false letters; nor does a wrong guess call into question a speaker's veracity. The Court's statement is also a flawed predicate on which to base its conclusion that Muniz's answer to this question was "testimonial" for purposes of the Fifth Amendment.

The need for the use of the human voice does not automatically make an answer testimonial, *United States* v. *Wade*, 388 U. S. 218, 222–223 (1967), any more than does the fact that a question calls for the exhibition of one's handwriting in written characters. *Gilbert* v. *California*, 388 U. S. 263, 266–267 (1967). In *Schmerber* v. *California*, 384 U. S. 757 (1966), we held that the extraction and chemical analysis of a blood sample involved no "shadow of testimonial compulsion upon or enforced communication by the accused." *Id.*, at 765. All of these holdings were based on Justice Holmes' opinion in *Holt* v. *United States*, 218 U. S. 245 (1910), where he said for the Court that "the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." *Id.*, at 252–253.

The sixth birthday question here was an effort on the part of the police to check how well Muniz was able to do a simple mathematical exercise. Indeed, had the question related only to the date of his birth, it presumably would have come under the "booking exception" to *Miranda* v. *Arizona*, 384 U. S. 436 (1966), to which the Court refers elsewhere in its opinion. The Court holds in this very case that Muniz may be required to perform a "horizontal gaze nystagmus" test, the "walk and turn" test, and the "one leg stand" test, all of which are designed to test a suspect's physical coordination. If the police may require Muniz to use his body in order to demonstrate the level of his physical coordination, there is no reason why they should not be able to require him to speak or write in order to determine his mental coordination. That was all that was sought here. Since it was permissible for the police to extract and examine a sample of Schmerber's blood to determine how much that part of his system had been affected by alcohol, I see no reason why they may not examine the functioning of Muniz's mental processes for the same purpose.

Surely if it were relevant, a suspect might be asked to take an eye examination in the course of which he might have to admit that he could not read the letters on the third line of the chart. At worst, he might utter a mistaken guess. Muniz likewise might have attempted to guess the correct response to the sixth birthday question instead of attempting to calculate the date or answer "I don't know." But the potential for giving a bad guess does not subject the suspect to the truth-falsity-silence predicament that renders a response testimonial and, therefore, within the scope of the Fifth Amendment privilege.

For substantially the same reasons, Muniz's responses to the videotaped "booking" questions were not testimonial and do not warrant application of the privilege. Thus, it is unnecessary to determine whether the questions fall within the "routine booking question" exception to *Miranda* JUSTICE BRENNAN recognizes.

I would reverse in its entirety the judgment of the Superior Court of Pennsylvania. But given the fact that five members of the Court agree that Muniz's response to the sixth birthday question should have been suppressed, I agree that the judgment of the Superior Court should be vacated so that, on remand, the court may consider whether admission of the response at trial was harmless error.

JUSTICE MARSHALL, concurring in part and dissenting in part.

I concur in Part III–B of the Court's opinion that the "sixth birthday question" required a testimonial response from respondent Muniz. For the reasons discussed below, see n. 1, *infra*, that question constituted custodial interrogation. Because the police did not apprise Muniz of his rights under *Miranda* v. *Arizona*, 384 U. S. 436 (1966), before asking the question, his response should have been suppressed.

I disagree, however, with JUSTICE BRENNAN's recognition in Part III–C of a "routine booking question" exception to *Miranda*. Moreover, even were such an exception war-

ranted, it should not extend to booking questions that the police should know are reasonably likely to elicit incriminating responses. Because the police in this case should have known that the seven booking questions were reasonably likely to elicit incriminating responses and because those questions were not preceded by *Miranda* warnings, Muniz's testimonial responses should have been suppressed.

I dissent from the Court's holding in Part IV that Muniz's testimonial statements in connection with the three sobriety tests and the breathalyzer test were not the products of custodial interrogation. The police should have known that the circumstances in which they confronted Muniz, combined with the detailed instructions and questions concerning the tests and the Commonwealth's Implied Consent Law, were reasonably likely to elicit an incriminating response, and therefore constituted the "functional equivalent" of express questioning. *Rhode Island* v. *Innis*, 446 U. S. 291, 301 (1980). Muniz's statements to the police in connection with these tests thus should have been suppressed because he was not first given the *Miranda* warnings.

Finally, the officer's directions to Muniz to count aloud during two of the sobriety tests sought testimonial responses, and Muniz's responses were incriminating. Because Muniz was not informed of his *Miranda* rights prior to the tests, those responses also should have been suppressed.

I

A

JUSTICE BRENNAN would create yet another exception to *Miranda:* the "routine booking question" exception. See also *Illinois* v. *Perkins*, *ante*, p. 292 (creating exception to *Miranda* for custodial interrogation by an undercover police officer posing as the suspect's fellow prison inmate). Such exceptions undermine *Miranda*'s fundamental principle that the doctrine should be clear so that it can be easily applied by both police and courts. See *Miranda*, *supra*, at 441–442;

Fare v. *Michael C.*, 442 U. S. 707, 718 (1979); *Perkins*, *ante*, at 308–309 (MARSHALL, J., dissenting). JUSTICE BRENNAN's position, were it adopted by a majority of the Court, would necessitate difficult, time-consuming litigation over whether particular questions asked during booking are "routine," whether they are necessary to secure biographical information, whether that information is itself necessary for recordkeeping purposes, and whether the questions are—despite their routine nature—designed to elicit incriminating testimony. The far better course would be to maintain the clarity of the doctrine by requiring police to preface all direct questioning of a suspect with *Miranda* warnings if they want his responses to be admissible at trial.

B

JUSTICE BRENNAN nonetheless asserts that *Miranda* does not apply to express questioning designed to secure "'"biographical data necessary to complete booking or pretrial services,"'" *ante*, at 601 (citation omitted), so long as the questioning is not "'designed to elicit incriminatory admissions,'" *ante*, at 602, n. 14 (quoting Brief for United States as *Amicus Curiae* 13; citing *United States* v. *Avery*, 717 F. 2d 1020, 1024–1025 (CA6 1983) (acknowledging that "[e]ven a relatively innocuous series of questions may, in light of the factual circumstances and the susceptibility of a particular suspect, be reasonably likely to elicit an incriminating response"); *United States* v. *Mata-Abundiz*, 717 F. 2d 1277, 1280 (CA9 1983) (holding that routine booking question exception does not apply if "the questions are reasonably likely to elicit an incriminating response in a particular situation"); *United States* v. *Glen-Archila*, 677 F. 2d 809, 816, n. 18 (CA11 1982) ("Even questions that usually are routine must be proceeded *[sic]* by *Miranda* warnings if they are intended to produce answers that are incriminating")). Even if a routine booking question exception to *Miranda* were warranted, that exception should not extend to any booking question

that the police should know is reasonably likely to elicit an incriminating response, cf. *Innis*, 446 U. S., at 301, regardless of whether the question is "designed" to elicit an incriminating response. Although the police's intent to obtain an incriminating response is relevant to this inquiry, the key components of the analysis are the nature of the questioning, the attendant circumstances, and the perceptions of the suspect. Cf. *id.*, at 301, n. 7. Accordingly, *Miranda* warnings are required before the police may engage in any questioning reasonably likely to elicit an incriminating response.

Here, the police should have known that the seven booking questions—regarding Muniz's name, address, height, weight, eye color, date of birth, and age—were reasonably likely to elicit incriminating responses from a suspect whom the police believed to be intoxicated. Cf. *id.*, at 302, n. 8 ("Any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response from the suspect"). Indeed, as the Court acknowledges, Muniz did in fact "stumbl[e] over his address and age," *ante*, at 586; more specifically, he was unable to give his address without looking at his license and initially told police the wrong age. Moreover, the very fact that, after a suspect has been arrested for driving under the influence, the Pennsylvania police regularly videotape the subsequent questioning strongly implies a purpose to the interrogation other than "recordkeeping." The seven questions in this case, then, do not fall within the routine booking question exception even under JUSTICE BRENNAN's standard.[1]

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[1] The sixth birthday question also clearly constituted custodial interrogation because it was a form of "express questioning." *Rhode Island* v. *Innis*, 446 U. S. 291, 300–301 (1980). Furthermore, that question would not fall within JUSTICE BRENNAN's proposed routine booking question exception. The question serves no apparent recordkeeping need, as the po-

C

Although JUSTICE BRENNAN does not address this issue, the booking questions sought "testimonial" responses for the same reason the sixth birthday question did: because the content of the answers would indicate Muniz's state of mind. *Ante*, at 598–599, and n. 12. See also *Estelle* v. *Smith*, 451 U. S. 454, 464–465 (1981). The booking questions, like the sixth birthday question, required Muniz to (1) answer correctly, indicating lucidity, (2) answer incorrectly, implying that his mental faculties were impaired, or (3) state that he did not know the answer, also indicating impairment. Muniz's initial incorrect response to the question about his age and his inability to give his address without looking at his license, like his inability to answer the sixth birthday question, in fact gave rise to the incriminating inference that his mental faculties were impaired. Accordingly, because the police did not inform Muniz of his *Miranda* rights before asking the booking questions, his responses should have been suppressed.

II

A

The Court finds in Part IV of its opinion that *Miranda* is inapplicable to Muniz's statements made in connection with the three sobriety tests and the breathalyzer examination because those statements (which were undoubtedly testimonial) were not the products of "custodial interrogation." In my view, however, the circumstances of this case—in particular, Muniz's apparent intoxication—rendered the officers' words and actions the "functional equivalent" of express questioning

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lice already possessed Muniz's date of birth. The absence of any administrative need for the question, moreover, suggests that the question was designed to obtain an incriminating response. Regardless of any administrative need for the question and regardless of the officer's intent, *Miranda* warnings were required because the police should have known that the question was reasonably likely to elicit an incriminating response. *Supra*, at 610–611.

because the police should have known that their conduct was "reasonably likely to evoke an incriminating response." *Innis*, *supra*, at 301. As the Court recounts, *ante*, at 602–604, Officer Hosterman instructed Muniz how to perform the sobriety tests, inquired whether Muniz understood the instructions, and then directed Muniz to perform the tests. Officer Deyo later explained the breathalyzer examination and the nature of the Commonwealth's Implied Consent Law, and asked several times if Muniz understood the Law and wanted to take the examination. *Ante*, at 604. Although these words and actions might not prompt most sober persons to volunteer incriminating statements, Officers Hosterman and Deyo had good reason to believe—from the arresting officer's observations, App. 13–19 (testimony of Officer Spotts), from Muniz's failure of the three roadside sobriety tests, *id.*, at 19, and from their own observations—that Muniz was intoxicated. The officers thus should have known that Muniz was reasonably likely to have trouble understanding their instructions and their explanation of the Implied Consent Law, and that he was reasonably likely to indicate, in response to their questions, that he did not understand the tests or the Law. Moreover, because Muniz made several incriminating statements regarding his intoxication during and after the roadside tests, *id.*, at 20–21, the police should have known that the same tests at the booking center were reasonably likely to prompt similar incriminating statements.

The Court today, however, completely ignores Muniz's condition and focuses solely on the nature of the officers' words and actions. As the Court held in *Innis*, however, the focus in the "functional equivalent" inquiry is on "the perceptions of the suspect," not on the officers' conduct viewed in isolation. 446 U. S., at 301. Moreover, the *Innis* Court emphasized that the officers' knowledge of any "unusual susceptibility" of a suspect to a particular means of eliciting information is relevant to the question whether they should have known that their conduct was reasonably likely to elicit

an incriminating response. *Id.*, at 302, n. 8; *supra*, at 610–611. See also *Arizona* v. *Mauro*, 481 U. S. 520, 531 (1987) (STEVENS, J., dissenting) (police "interrogated" suspect by allowing him to converse with his wife "at a time when they knew [the conversation] was reasonably likely to produce an incriminating statement"). Muniz's apparent intoxication, then, and the police's knowledge of his statements during and after the roadside tests compel the conclusion that the police should have known that their words and actions were reasonably likely to elicit an incriminating response.[2] Muniz's statements were thus the product of custodial interrogation and should have been suppressed because Muniz was not first given the *Miranda* warnings.

B

The Court concedes that Officer Hosterman's directions that Muniz count aloud to 9 while performing the "walk and turn" test and to 30 while performing the "one leg stand" test constituted custodial interrogation. *Ante*, at 603, and n. 17. Also indisputable is the testimonial nature of the responses sought by those directions; the content of Muniz's counting, just like his answers to the sixth birthday and the booking questions, would provide the basis for an inference regarding his state of mind. Cf. *ante*, at 599; *supra*, at 612. The Court finds the admission at trial of Muniz's responses permissible, however, because they were not incriminating "except to the extent [they] exhibited a tendency to slur words,

[2] An additional factor strongly suggests that the police expected Muniz to make incriminating statements. Pursuant to their routine in such cases, App. 28–29, the police allotted 20 minutes for the three sobriety tests and for "observation." Because Muniz finished the tests in approximately 6 minutes, the police required him to wait another 14 minutes before they asked him to submit to the breathalyzer examination. Given the absence of any apparent technical or administrative reason for the delay and the stated purpose of "observing" Muniz, the delay appears to have been designed in part to give Muniz the opportunity to make incriminating statements.

which [the Court already found to be] nontestimonial [evidence]." *Ante*, at 603, n. 17. The Court's conclusion is wrong for two reasons. First, as a factual matter, Muniz's responses *were* incriminating for a reason other than his apparent slurring. Muniz did not count at all during the walk and turn test, supporting the inference that he was unable to do so.[3] And, contrary to the Court's assertion, *ibid.*, during the one leg stand test, Muniz incorrectly counted in Spanish from one to six, skipping the number two. Even if Muniz had not skipped "two," his failure to complete the count was incriminating in itself.

Second, and more importantly, Muniz's responses would have been "incriminating" for purposes of *Miranda* even if he had fully and accurately counted aloud during the two tests. As the Court stated in *Innis*, "[b]y 'incriminating response' we refer to any response—whether inculpatory or exculpatory—that the *prosecution* may seek to introduce at trial." 446 U. S., at 301, n. 5. See also *Miranda*, 384 U. S., at 476–477 ("The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory'"). Thus, *any* response by

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[3] The Commonwealth could not use Muniz's failure to count against him regardless of whether his silence during the walk and turn test was itself testimonial in those circumstances. Cf. *ante*, at 603, n. 17. A defendant's silence in response to police questioning is not admissible at trial even if the silence is not, in the particular circumstances, a form of communicative conduct. *Miranda* v. *Arizona*, 384 U. S. 436, 468, n. 37 (1966) ("[I]t is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation"). Cf. *Griffin* v. *California*, 380 U. S. 609, 615 (1965) ("[T]he Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt").

Muniz that the prosecution sought to use against him was incriminating under *Miranda*. That the majority thinks Muniz's responses were incriminating only because of his slurring is therefore irrelevant. Because Muniz did not receive the *Miranda* warnings, then, his responses should have been suppressed.

III

All of Muniz's responses during the videotaped session were prompted by questions that sought testimonial answers during the course of custodial interrogation. Because the police did not read Muniz the *Miranda* warnings before he gave those responses, the responses should have been suppressed. I would therefore affirm the judgment of the state court.[4]

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[4] I continue to have serious reservations about the Court's limitation of the Fifth Amendment privilege to "testimonial" evidence. See *United States* v. *Mara*, 410 U. S. 19, 32–38 (1973) (MARSHALL, J., dissenting). I believe that privilege extends to *any* evidence that a person is compelled to furnish against himself. *Id.*, at 33–35. At the very least, the privilege includes evidence that can be obtained only through the person's affirmative cooperation. *Id.*, at 36–37. Of course, a person's refusal to incriminate himself also cannot be used against him. See n. 3, *supra*. Muniz's performance of the sobriety tests and his refusal to take the breathalyzer examination are thus protected by the Fifth Amendment under this interpretation. But cf. *ante*, at 604–605, n. 19. Because Muniz does not challenge the admission of the video portion of the videotape showing the sobriety tests or of his refusal to take the breathalyzer examination, however, those issues are not before this Court.

Syllabus

SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* FINKELSTEIN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 89–504. Argued April 24, 1990—Decided June 18, 1990

Title 42 U. S. C. § 405(g), which is not further divided into subsections, provides, *inter alia*, that: An individual may obtain judicial review of a final decision of the Secretary of Health and Human Services under the Social Security Act by filing "a civil action" in the district court (sentence one); in such action, that court has the power to enter "a *judgment* affirming, modifying, or reversing the [Secretary's] decision, *with or without remanding the cause for a rehearing*" (sentence four) (emphasis added); that court may order a remand for the taking of additional evidence, "but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding" (sentence six); that court may review the Secretary's postremand "additional or modified findings of fact and decision" (sentence seven); and that court's judgment "shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions" (sentence eight). Respondent filed an application for widow's disability benefits under § 423(d)(2)(B), which authorizes an award to a widow whose impairment is of a level of severity deemed sufficient by the Secretary's regulations to preclude an individual from engaging in any gainful activity. Under those regulations, a surviving spouse who suffers from an impairment meeting or equaling the severity of an impairment included in the Secretary's Listing of Impairments is disabled. After respondent's application was denied on the ground that her heart condition did not meet or equal a listed impairment, she filed suit in the District Court, invoking § 405(g). The court sustained the Secretary's conclusion that she did not meet the regulatory definition for disability, but reversed the decision and remanded the case for a determination of her ability to engage in any gainful activity without regard to the regulation. The Court of Appeals dismissed the Secretary's appeal for lack of jurisdiction, because remands to administrative agencies are not ordinarily "final decisions" appealable under 28 U. S. C. § 1291. It held that the exception for cases in which an important legal issue is finally resolved and review of that issue would be foreclosed as a practical matter if an immediate appeal were unavailable was inapplicable because, if the Secretary persisted in refusing benefits on

remand, the District Court might order that benefits be granted, thereby providing the Secretary with an appealable final decision. The court also believed that Circuit precedent foreclosed the Secretary's argument that he might not be able to obtain review at a later point if he awarded benefits on remand.

Held: The Secretary may immediately appeal a district court order effectively invalidating regulations limiting the kinds of inquiries that must be made to determine entitlement to disability insurance benefits and remanding a claim to the Secretary for consideration without those restrictions. Pp. 623–631.

(a) The District Court's order essentially invalidated, as inconsistent with the Act, regulations restricting eligibility for widow's disability benefits. Pp. 623–624.

(b) Section 405(g)'s text and structure define the court of appeals' jurisdiction. The term "a civil action" in sentence one suggests that each final decision of the Secretary is reviewable by a separate piece of litigation. Here, the District Court entered a judgment pursuant to sentence four: It reversed the Secretary's decision and "remand[ed] the cause for a rehearing." Unquestionably this is a "judgment" in § 405(g)'s terminology, as the court terminated the civil action challenging the Secretary's final decision, set aside that decision, and decided that the Secretary could not follow his own regulations on remand. Since there would be grave doubt whether the Secretary could appeal his own order if on remand he awarded benefits, the District Court's order was a "final judgment" subject to further review under sentence eight. Pp. 624–625.

(c) Respondent's several arguments countering this construction of § 405(g) are unpersuasive. First, the remand in this case was not ordered pursuant to sentence six, since a sixth-sentence remand is appropriate only when the district court learns of evidence not in existence or available to the claimant at the time of the administrative proceeding that might have changed that proceeding's outcome. Second, the post-remand judicial review contemplated by sentence seven refers only to reviews in cases that were previously remanded under sentence six, and thus does not fit the kind of remand ordered in this case. Third, sentence eight does in fact compel the conclusion that a fourth-sentence judgment is immediately appealable. That Congress may have used "final" to mean conclusively decided for res judicata purposes does not preclude the construction of "final" to include "appealable," a meaning with which "final" is usually coupled. Moreover, Congress is empowered to define a class of orders that are "final judgments" within the meaning of § 1291, and that is precisely what it has done in sentence four. Fourth, sentence four does not limit a district court's power to remand a case, since it does not require the court to choose between entering a

final judgment and remanding, but specifically provides that it may do both. Finally, language in *Sullivan* v. *Hudson*, 490 U. S. 877, suggesting that this type of remand order is not appealable as a final decision is insufficient to sustain respondent's contentions here, since that case dealt with the interpretation of the Equal Access to Justice Act's term "any civil action," not with whether a remand order could be appealed as a "final decision" under § 1291. Pp. 625–631.

869 F. 2d 215, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, MARSHALL, STEVENS, O'CONNOR, and KENNEDY, JJ., joined, and in which SCALIA, J., joined except as to n. 8. SCALIA, J., filed an opinion concurring in part, *post*, p. 631. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 632.

Deputy Solicitor General Shapiro argued the cause for petitioner. With him on the briefs were *Solicitor General Starr*, *Assistant Attorney General Gerson*, and *Edwin S. Kneedler*.

Kenneth V. Handal argued the cause for respondent. With him on the brief were *Dennis G. Lyons* and *Mary G. Sprague*.

JUSTICE WHITE delivered the opinion of the Court.

We granted certiorari to decide whether the Secretary of Health and Human Services may immediately appeal a district court order effectively declaring invalid regulations that limit the kinds of inquiries that must be made to determine whether a person is entitled to disability insurance benefits and remanding a claim for benefits to the Secretary for consideration without those restrictions. We hold that the Secretary may appeal such an order as a "final decision" under 28 U. S. C. § 1291.[1]

I

Respondent Finkelstein is the widow of a wage earner who died in 1980 while fully insured under Title II of the Social

[1] Title 28 U. S. C. § 1291 provides that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts . . . except where a direct review may be had in the Supreme Court."

Security Act, 49 Stat. 622, as amended, 42 U. S. C. § 401 *et seq.* (1982 ed.). In 1983, respondent applied to the Social Security Administration for widow's disability benefits, claiming that her heart condition made her disabled within the meaning of the section of the Social Security Act providing for surviving spouses' disability insurance benefit payments, § 223, as added, 70 Stat. 815, and as amended, 42 U. S. C. §§ 423(d)(1)(A), (d)(2)(B) (1982 ed. and Supp. V).

Section 423(d)(2)(B) states that a widow shall not be determined to be disabled unless her impairment is of a level of severity which, "under regulations prescribed by the Secretary," is deemed sufficient to preclude an individual from engaging in any gainful activity. Under regulations promulgated by the Secretary, 20 CFR §§ 404.1577, 404.1578(a)(1) (1989), a surviving spouse is deemed disabled only if the spouse suffers from a physical or mental impairment meeting or equaling the severity of an impairment included in the Secretary's Listing of Impairments located at Appendix 1 to 20 CFR pt. 404, subpt. P (1989). If the surviving spouse's impairment does not meet or equal one of the listed impairments, the Secretary will not find the spouse disabled; in particular, the Secretary will not consider whether the spouse's impairment nonetheless makes the spouse disabled, given the spouse's age, education, and work experience.

The Secretary's practice for spouses' disability insurance benefits thus differs significantly from the regulations for determining whether a wage earner is entitled to disability insurance benefits. For wage earners, the Secretary has established a "five-step sequential evaluation process for determining whether a person is disabled." *Bowen* v. *Yuckert*, 482 U. S. 137, 140 (1987). Under that five-step process, even if a wage earner's impairment does not meet or equal one of the listed impairments, the wage earner may nonetheless be entitled to disability insurance benefits if the Secretary determines that his "impairment in fact prevents him from working." *Sullivan* v. *Zebley*, 493 U. S. 521, 535

(1990). The Secretary maintains that the difference between the wage earner regulations and the surviving spouse regulations is supported by a difference between the two pertinent statutory definitions of disability. Compare 42 U. S. C. § 423(d)(2)(A) with § 423(d)(2)(B) (1982 ed. and Supp. V).

Respondent's application for benefits was denied on the ground that her heart condition did not meet or equal a listed impairment. After exhausting administrative remedies, respondent sought judicial review of the Secretary's decision in the United States District Court for the District of New Jersey, invoking § 205(g) of the Social Security Act, as amended, 53 Stat. 1370, 42 U. S. C. § 405(g) (1982 ed.).[2] The District

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[2] Title 42 U. S. C. § 405(g) (1982 ed.) provides:

"Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evi-

Court sustained the Secretary's conclusion that respondent did not suffer from an impairment that met or equaled a listed impairment. See App. to Pet. for Cert. 16a. The District Court nonetheless concluded that "the case must be remanded to the Secretary," *id.*, at 17a, because the record was "devoid of any findings" regarding respondent's inability to engage in any gainful activity even though her impairment was not equal to one of the listed impairments, see *ibid.*

The Court of Appeals for the Third Circuit dismissed the Secretary's appeal for lack of jurisdiction. *Finkelstein* v. *Bowen*, 869 F. 2d 215 (1989). The Court of Appeals relied on its past decisions holding that "'remands to administrative agencies are not ordinarily appealable.'" *Id.*, at 217 (citation omitted). Although the Court of Appeals acknowledged an exception to that rule for cases "in which an important legal issue is finally resolved and review of that issue would be foreclosed 'as a practical matter' if an immediate appeal were unavailable," *ibid.* (citation omitted), that exception was deemed inapplicable in this case because the Secretary might persist in refusing benefits even after consideration of respondent's residual functional capacity on remand, and the District Court might thereafter order that benefits be granted, thereby providing the Secretary with an appealable

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dence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office."

final decision. *Id.*, at 220. The Court of Appeals conceded that the Secretary might not be able to obtain review at a later point if he concluded on remand that respondent was entitled to benefits based on her lack of residual functional capacity, but it believed this argument for immediate appealability to be foreclosed by a prior decision of the Circuit. *Ibid.* We granted certiorari, 493 U. S. 1055 (1990).

II

We begin by noting that the issue before us is not the broad question whether remands to administrative agencies are always immediately appealable. There is, of course, a great variety in remands, reflecting in turn the variety of ways in which agency action may be challenged in the district courts and the possible outcomes of such challenges.[3] The question before us rather is whether orders of the type entered by the District Court in this case are immediately appealable by the Secretary. It is necessary therefore to consider precisely what the District Court held and why it remanded this case to the Secretary.

Although the District Court sustained the Secretary's conclusion that respondent did not suffer from an impairment that met or equaled the severity of a listed impairment, it concluded that the Secretary's ultimate conclusion that respondent was not disabled could not be sustained because other medical evidence suggested that respondent might not

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[3] For example, a district court may on occasion order a remand to an agency even though the district court action was filed by the agency, not someone seeking judicial review, *e. g.*, *United States* v. *Alcon Laboratories*, 636 F. 2d 876 (CA1), cert. denied, 451 U. S. 1017 (1981). In other cases the district court may order a remand to the agency but the person seeking judicial review may seek to appeal on the ground that broader relief should have been granted by the district court, *e. g.*, *Bohms* v. *Gardner*, 381 F. 2d 283 (CA8 1967), cert. denied, 390 U. S. 964 (1968). None of these situations are presented in this case, and we express no opinion about appealability in those circumstances.

be able to engage in any gainful activity.[4] Considering it "anomalous" that an impairment actually leaving respondent without the residual functional capacity to perform any gainful activity could be insufficient to warrant benefits just because it was not equal to one of the listed impairments, the District Court directed the Secretary "to inquire whether [respondent] may or may not engage in any gainful activity, as contemplated by the Act." App. to Pet. for Cert. 18a. The District Court's order thus essentially invalidated, as inconsistent with the Social Security Act, the Secretary's regulations restricting spouses' disability insurance benefits to those claimants who can show that they have impairments with "specific clinical findings that are the same as . . . or are medically equivalent to" one of the listed impairments, 20 CFR § 404.1578(a)(1) (1989). Cf. *Heckler* v. *Campbell*, 461 U. S. 458, 465–466 (1983). The District Court stated that it was "remand[ing]" the case to the Secretary because the record contained no findings about the functional impact of respondent's impairment; in effect it ordered the Secretary to address respondent's ailment without regard for the regulations that would have precluded such consideration. The District Court's order thus reversed the Secretary's conclusion that respondent was not disabled and remanded for further consideration of respondent's medical condition.

Once the nature of the District Court's action is clarified, it becomes clear how this action fits into the structure of § 405 (g). The first sentence of § 405(g) provides that an individual denied benefits by a final decision of the Secretary may obtain judicial review of that decision by filing "a civil action" in federal district court. The use of the term "a civil action"

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[4] Specifically, the District Court noted that an Administrative Law Judge "found that the 'medical findings shown in the medical evidence of record establish the existence of mitral valve prolapse,'" App. to Pet. for Cert. 17a, which does not meet or equal one of the listed impairments but might, in the District Court's view, prevent respondent from engaging in any gainful activity, *ibid.*

suggests that at least in the context of § 405(g), each final decision of the Secretary will be reviewable by a separate piece of litigation.[5] The fourth and eighth sentences of § 405(g) buttress this conclusion. The fourth sentence states that in such a civil action, the district court shall have the power to enter "a *judgment* affirming, modifying, or reversing the decision of the Secretary, *with or without remanding the cause for a rehearing.*" (Emphasis added.) This sentence describes the action that the District Court actually took in this case. In particular, although the fourth sentence clearly foresees the possibility that a district court may remand a cause to the Secretary for rehearing (as the District Court did here), nonetheless such a remand order is a "judgment" in the terminology of § 405(g). What happened in this case is that the District Court entered "a judgment . . . reversing the decision of the Secretary, with . . . remanding the cause for a rehearing." The District Court's remand order was unquestionably a "judgment," as it terminated the civil action challenging the Secretary's final determination that respondent was not entitled to benefits, set aside that determination, and finally decided that the Secretary could not follow his own regulations in considering the disability issue. Furthermore, should the Secretary on remand undertake the inquiry mandated by the District Court and award benefits, there would be grave doubt, as the Court of Appeals recognized, whether he could appeal his own order. Thus it is that the eighth sentence of § 405(g) provides that "[t]he judgment of the court *shall be final* except that it shall be subject to review in the same manner as a judgment in other civil actions." (Emphasis added.)

Respondent makes several arguments countering this construction of § 405(g) and of the District Court's order, none of which persuade us. First, respondent argues that the re-

[5] Neither party suggests that the Secretary's decision denying respondent benefits without considering her mitral valve prolapse was not a "final decision of the Secretary" within the meaning of § 405(g).

mand in this case was ordered not pursuant to the fourth sentence of § 405(g), but under the sixth sentence of that section, which states in pertinent part that the District Court may "at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding." Respondent points out that the District Court stated that it was ordering a remand because the evidence on the record was insufficient to support the Secretary's conclusion and that further factfinding regarding respondent's ailment was necessary. We do not agree with respondent that the District Court's action in this case was a "sixth-sentence remand." The sixth sentence of § 405(g) plainly describes an entirely different kind of remand, appropriate when the district court learns of evidence not in existence or available to the claimant at the time of the administrative proceeding that might have changed the outcome of that proceeding.[6]

For the same reason, we reject respondent's argument, based on the seventh sentence of § 405(g), that the district court may enter an appealable final judgment upon reviewing the Secretary's postremand "additional or modified findings of fact and decision." The postremand review conducted by the District Court under the seventh sentence refers only to

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[6] See, *e. g.*, *Caulder* v. *Bowen*, 791 F. 2d 872 (CA11 1986); *Borders* v. *Heckler*, 777 F. 2d 954, 955 (CA4 1985); *Newhouse* v. *Heckler*, 753 F. 2d 283, 287 (CA3 1985); *Booz* v. *Secretary of Health and Human Services*, 734 F. 2d 1378, 1381 (CA9 1984); *Dorsey* v. *Heckler*, 702 F. 2d 597, 604–605 (CA5 1983); *Cagle* v. *Califano*, 638 F. 2d 219, 221 (CA10 1981). Although all the Circuits recognize that new evidence must be "material" to warrant a sixth-sentence remand, it is not clear whether the Circuits have interpreted the requirement of materiality in the same way. See *Dorsey*, *supra*, at 605, n. 9 (criticizing "stricter position" of Fourth and Tenth Circuits); *Godsey* v. *Bowen*, 832 F. 2d 443, 444 (CA7 1987) (expressing skepticism about existence of conflict); *Borders*, *supra*, at 956 (also skeptical). We express no opinion on the proper definition of materiality in this context.

cases that were previously remanded under the sixth sentence. The seventh sentence states that the district court may review "[s]uch additional or modified findings of fact," a reference to the second half of the sixth sentence of § 405(g), which requires that "the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision . . . ." The phrase "such additional evidence" refers in turn to the "additional evidence" mentioned in the first half of the sixth sentence that the district court may order the Secretary to take in a sixth-sentence remand. See *supra*, at 625–626. But as the first half of the sixth sentence makes clear, the taking of this additional evidence may be ordered only upon a showing that there is material new evidence. The postremand judicial review contemplated by the seventh sentence of § 405(g) does not fit the kind of remand ordered by the District Court in this case.

Respondent also argues that the eighth sentence of § 405(g), providing that the judgment of the district court "shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions," does not compel the conclusion that a judgment entered pursuant to the fourth sentence is immediately appealable. In respondent's view, Congress used the the term "final" in the eighth sentence only to make clear that a court's decision reviewing agency action could operate as law of the case and res judicata. Cf. *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U. S. 320, 336 (1958). But even if it is true that Congress used the term "final" to mean "conclusively decided," this reading does not preclude the construction of "final" to include "appealable," a meaning with which "final" is usually coupled. Nor does respondent consider the significance of Congress' use of the term "judgment" to describe the action

taken by the District Court in this case.[7] Although respondent argues that the words "final decisions," as used in 28 U. S. C. § 1291, encompass no more than what was meant by the terms "final judgments and decrees" in the predecessor statute to § 1291, respondent recognizes that "final judgments" are at the core of matters appealable under § 1291, and respondent does not contest the power of Congress to define a class of orders as "final judgments" that by inference would be appealable under § 1291. Cf. *Sears, Roebuck & Co.* v. *Mackey*, 351 U. S. 427, 434 (1956). This is what Congress has done in the fourth sentence of § 405(g).[8]

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[7] It is true, as respondent maintains, that the District Court did not caption its order as a "judgment," much less a "final judgment." The label used by the District Court of course cannot control the order's appealability in this case, any more than it could when a district court labeled a nonappealable interlocutory order as a "final judgment." See *Liberty Mutual Ins. Co.* v. *Wetzel*, 424 U. S. 737 (1976).

[8] Respondent also makes two arguments based on subsequent legislative history to counter the conclusion that Congress intended orders entered under the fourth sentence of § 405(g) to be appealable final judgments. First, she relies on a committee print prepared by the Social Security Subcommittee of the House Ways and Means Committee which, in summarizing amendments to the Social Security Act, stated that under prior law, a district court could remand a case to the Secretary on its own motion and that the judgment of the district court would be final *after* the Secretary filed any modified findings of fact and decision with the court, and that no change had been made by the amendments. See The Social Security Amendments of 1977: Brief Summary of Major Provisions and Detailed Comparison With Prior Law, WMCP No. 95–72, p. 26 (1978) (Brief Summary). The committee print's observations are entirely consistent with the construction we have placed on remands ordered under the sixth sentence of § 405(g). Moreover, leaving aside all the usual difficulties inherent in relying on subsequent legislative history, see, *e. g.*, *United States* v. *Mine Workers*, 330 U. S. 258, 281–282 (1947), we note that the print specifically warned that it was prepared by the subcommittee staff for informational purposes only and was not considered or approved by the subcommittee, and that it was designed not to be a section-by-section analysis of the amendments but only a "narrative synopsis." Brief Summary,

More generally, respondent argues that a power in the district court to remand to an agency is always incident to the power to review agency action and that § 405(g) only expanded the district courts' equitable powers; therefore, she insists, it is improper to construe § 405(g) as a limit on the district courts' power to remand. This argument misapprehends what Congress sought to accomplish in § 405(g). The fourth sentence of § 405(g) does not "limit" the district courts' authority to remand. Rather, the fourth sentence directs the entry of a final, appealable judgment even though that judgment may be accompanied by a remand order. The fourth sentence does not require the district court to choose between entering a final judgment and remanding; to the contrary, it specifically provides that a district court may enter judgment "with or without remanding the cause for a rehearing."

Finally, respondent argues that we already decided last Term, in *Sullivan* v. *Hudson*, 490 U. S. 877 (1989), that a remand order of the kind entered in this case is not appealable as a final decision. Although there is language in *Hudson*

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at I, V. We therefore cannot assign this committee print any significant weight.

Second, respondent relies on a House Judiciary Committee Report on amendments to the Equal Access to Justice Act (EAJA), stating that a district court's remand decision under § 405(g) is not a "final judgment." H. R. Rep. No. 99–120, p. 19 (1985). Again, we cannot conclude that this subsequent legislative history overthrows the language of § 405(g). In the first place, this part of this particular Committee Report concerned the proper time period for filing a petition for attorney's fees under EAJA, not appealability. Second, the Committee relied in particular on *Guthrie* v. *Schweiker*, 718 F. 2d 104 (CA4 1983), for the proposition that a remand order is not a final judgment, but *Guthrie* also concerned the time for filing an attorney's fees petition, and it is far from clear that *Guthrie* did not involve a sixth-sentence remand. *Guthrie*, in turn, relied on *Gilcrist* v. *Schweiker*, 645 F. 2d 818, 819 (CA9 1981), which, quite unlike the present case, involved an appeal from a district court remand order that did "no more than order clarification of the administrative decision."

supporting respondent's interpretation of that case, we do not find that language sufficient to sustain respondent's contentions here. In *Hudson*, we held that under the EAJA, 28 U. S. C. § 2412(d)(1)(A), a federal court may award a Social Security claimant attorney's fees for representation during administrative proceedings held pursuant to a district court order remanding the action to the Secretary. We were concerned there with interpreting the term "any civil action" in the EAJA,[9] not with deciding whether a remand order could be appealed as a "final decision" under 28 U. S. C. § 1291. We noted in *Hudson* that the language of § 2412(d)(1)(A) must be construed with reference to the purpose of the EAJA and the realities of litigation against the Government. The purpose of the EAJA was to counterbalance the financial disincentives to vindicating rights against the Government through litigation; given this purpose, we could not believe that Congress would "throw the Social Security claimant a lifeline that it knew was a foot short" by denying her attorney's fees for the mandatory proceedings on remand. *Hudson*, *supra*, at 890. We also recognized that even if a claimant had obtained a remand from the district court, she would not be a "prevailing party" for purposes of the EAJA until the result of the administrative proceedings held on remand was known. 490 U. S., at 887–888. We therefore concluded that for purposes of the EAJA, the administrative proceedings on remand "should be considered part and parcel of the action for which fees may be awarded." *Id.*, at 888. We did not say that proceedings on remand to an agency are "part and parcel"

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[9] Title 28 U. S. C. § 2412(d)(1)(A) provides in pertinent part:

"Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."

of a civil action in federal district court for all purposes, and we decline to do so today.

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, concurring in part.

I join the opinion of the Court, except for footnote 8, which responds on the merits to "two arguments based on subsequent legislative history." *Ante*, at 628, n. 8.

The legislative history of a statute is the history of its consideration and enactment. "Subsequent legislative history"—which presumably means the *post*-enactment history of a statute's consideration and enactment—is a contradiction in terms. The phrase is used to smuggle into judicial consideration legislators' expressions *not* of what a bill currently under consideration means (which, the theory goes, reflects what their colleagues understood they were voting for), but of what a law *previously enacted* means.

It seems to be a rule for the use of subsequent legislative history that the legislators or committees of legislators whose post-enactment views are consulted must belong to the institution that passed the statute. Never, for example, have I seen floor statements of Canadian MP's cited concerning the meaning of a United States statute; only statements by Members of Congress qualify. No more connection than that, however, is required. It is assuredly *not* the rule that the legislators or committee members in question must have considered, or at least voted upon, the particular statute in question—or even that they have been members of the particular Congress that enacted it. The subsequent legislative history rejected as inconclusive in today's footnote, for example, tells us (according to the Court's analysis) what committees of the 99th and 95th Congresses thought the 76th Congress intended.

In my opinion, the views of a legislator concerning a statute already enacted are entitled to no more weight than the views of a judge concerning a statute not yet passed. In some situations, of course, the expression of a legislator relating to a previously enacted statute may bear upon the meaning of a provision in a bill under consideration—which provision, if passed, may in turn affect judicial interpretation of the previously enacted statute, since statutes *in pari materia* should be interpreted harmoniously. Such an expression would be useful, if at all, not because it was subsequent legislative history of the earlier statute, but because it was plain old legislative history of the later one.

Arguments based on subsequent legislative history, like arguments based on antecedent futurity, should not be taken seriously, not even in a footnote.

JUSTICE BLACKMUN, concurring in the judgment.

I am not convinced, as the other Members of the Court appear to be, that the order with which we are concerned is a final decision. It seems to me that the Court in its opinion expends its energy fending off respondent's arguments as to nonappealability, without itself demonstrating finality in a positive way.

I concur in the judgment, however. Although I think the order is not a final decision under 28 U. S. C. § 1291, it is immediately appealable under the collateral order doctrine enunciated in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949). This is the view adopted by the great majority of the Courts of Appeals, and I am in agreement with their conclusions. See, *e. g.*, *Colon* v. *Secretary of HHS*, 877 F. 2d 148, 151–152 (CA1 1989); *Doughty* v. *Bowen*, 839 F. 2d 644, 645–646 (CA10 1988); *Huie* v. *Bowen*, 788 F. 2d 698, 701–703 (CA11 1986).

Syllabus

PENSION BENEFIT GUARANTY CORPORATION *v.* THE LTV CORP. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 89–390. Argued February 27, 1990—Decided June 18, 1990

Title IV of the Employee Retirement Income Security Act of 1974 (ERISA) includes a mandatory Government insurance program that protects private-sector workers participating in covered pension plans against the termination of their plans before sufficient funds have been accumulated to pay anticipated benefits. The program is administered by petitioner Pension Benefit Guaranty Corporation (PBGC), which is responsible for paying terminated plans' unfunded liabilities out of the proceeds of annual premiums collected from employers maintaining ongoing plans. Respondent The LTV Corporation and many of its subsidiaries (collectively LTV) filed reorganization petitions under the Bankruptcy Code for the purpose, *inter alia*, of restructuring the pension obligations of one of the subsidiaries under three ERISA-covered, chronically underfunded pension plans (Plans), two of which could not be voluntarily terminated by LTV under ERISA's terms because they resulted from collective-bargaining negotiations with the United Steelworkers of America. In light of LTV's statement that it could no longer provide complete funding, the PBGC sought involuntary termination of the Plans to protect the insurance program from the risk of large losses. After the District Court terminated the Plans, LTV and the Steelworkers negotiated new pension arrangements, which the PBGC characterized as "follow-on" plans; *i. e.*, arrangements designed to wrap around PBGC insurance benefits to provide substantially the same benefits as would have been received had no termination occurred. Pursuant to its anti-follow-on policy, which considers such plans to be "abusive" of the insurance program, and in light of its perception that LTV's financial circumstances had dramatically improved, the PBGC issued a notice of restoration of the terminated Plans under § 4047 of ERISA, which authorizes the PBGC to undo a termination "in any . . . case in which [it] determines such action to be appropriate and consistent with its duties under [Title IV]." When LTV refused to comply with the restoration decision, the PBGC filed an enforcement action, but the District Court vacated the decision upon finding, among other things, that the PBGC had exceeded its § 4047 authority. The Court of Appeals affirmed, holding that the restoration decision was, in various respects, "arbitrary and

capricious" or contrary to law under the Administrative Procedure Act (APA), 5 U. S. C. § 706(2)(A).

Held: The PBGC's restoration decision was not arbitrary and capricious or contrary to law under § 706(2)(A). Pp. 645–656.

(a) The PBGC's failure to consider and discuss the "policies and goals" underlying federal bankruptcy and labor law did not, as the Court of Appeals held, render the restoration decision arbitrary and capricious. That holding cannot be reconciled with the plain language of § 4047, which does not direct that the decision further the "public interest" generally, but, rather, specifically and unambiguously requires the PBGC to focus on ERISA. Moreover, if agency action could be disturbed whenever a reviewing court was able to pinpoint an arguably relevant statutory policy that was not explicitly considered, a very large number of agency decisions might be open to judicial invalidation in light of numerous federal statutes that could be said to embody countless goals. Also, because the PBGC can claim no expertise in the labor and bankruptcy areas, it may be ill equipped to undertake the difficult task of discerning and applying the "policies and goals" of those fields. Pp. 645–647.

(b) The PBGC's anti-follow-on policy is not contrary to law. A clear congressional intent to avoid restoration decisions based on the existence of follow-on plans is not evinced by the text of § 4047, which embodies a broad grant of authority to the PBGC, or by the legislative history of ERISA or its 1987 amendments. Moreover, the policy is based on a "permissible" construction that is rational and consistent with § 4047 and is therefore entitled to deference. The policy is premised on the eminently reasonable belief that employees will object more strenuously to a company's original termination decision if a follow-on plan cannot be used to put them in the same position after termination as they were in before. The availability of such a plan thus would remove employee resistance as a significant check against termination, and may therefore tend to frustrate one of ERISA's objectives that the PBGC is supposed to accomplish—the continuation and maintenance of voluntary private plans. In addition, such plans have a tendency to increase the PBGC's deficit and employers' insurance premiums, thereby frustrating a related ERISA objective—the maintenance of low premiums. Although the employer's financial improvement may be relevant to the restoration decision, it is not, as respondents contend, the only permissible consideration. It is rational for the PBGC to disfavor follow-on plans where, as here, there is no suggestion that immediate retermination will be rendered necessary by the employers' financial situation. Pp. 647–652.

(c) The restoration decision in this case was not rendered arbitrary and capricious by the use of inadequate procedures. Since the Court of Appeals did not point to any APA or ERISA provision giving LTV the

procedural rights identified by the court—an apprisal of material on which the decision was to be based, an adequate opportunity to offer contrary evidence, proceedings in accordance with ascertainable standards, and a statement showing the PBGC's reasoning in applying those standards—the court's holding ran afoul of *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 524. Moreover, since there was no suggestion that the administrative record was inadequate to enable the court to fulfill its § 706 duties, its holding finds no support in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402, 419. Nor is LTV aided by the dictum of *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U. S. 281, 288, n. 4, that a "party is entitled . . . to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it." That statement was made in the context of a formal agency adjudication under the trial-type procedures of the APA, 5 U. S. C. §§ 554, 556–557, which require notice of the factual and legal matters asserted, an opportunity for the submission and consideration of facts and arguments, and an opportunity to submit proposed findings and conclusions or exceptions. The determination here, however, was lawfully made by informal adjudication under § 555, which does not require such elements. Pp. 653–656.

875 F. 2d 1008, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, MARSHALL, SCALIA, and KENNEDY, JJ., joined, and in which WHITE and O'CONNOR, JJ., joined except as to the statement of judgment and n. 11. WHITE, J., filed an opinion concurring in part and dissenting in part, in which O'CONNOR, J., joined, *post*, p. 656. STEVENS, J., filed a dissenting opinion, *post*, p. 657.

Carol Connor Flowe argued the cause for petitioner. With her on the briefs were *James J. Armbruster*, *Raymond Morgan Forster*, *Thomas S. Martin*, *Richard K. Willard*, and *Charles G. Cole*.

Lewis B. Kaden argued the cause for respondents. With him on the brief for respondents The LTV Corporation et al. were *Karen E. Wagner*, *Michael J. Crames*, *Marc Abrams*, and *Frank Cummings*. *Robin E. Phelan* and *Kathryn C. Mallory* filed a brief for respondent Banctexas Dallas, N. A. *Joel B. Zweibel*, *Geoffrey M. Kalmus*, *Michael J. Dell*, and *Peter V. Pantaleo* filed a brief for respondent LTV Bank

Group. *R. A. King* and *Kenneth R. Bruce* filed a brief for respondents David H. Miller et al. *Edgar H. Booth, Richard H. Kuh,* and *Mary S. Zitwer* filed a brief for respondent Official Committee of Equity Security Holders. *Leonard M. Rosen, Lawrence P. King, Theodore Gewertz, Harold S. Novikoff, Brian M. Cogan,* and *Mark A. Speiser* filed a brief for respondent Official Committee of Unsecured Creditors of LTV Steel Company, Inc. *William H. Roberts, Raymond L. Shapiro, Thomas E. Biron, William E. Taylor III,* and *Ann B. Laupheimer* filed a brief for respondent Official Parent Creditors' Committee of The LTV Corporation.*

JUSTICE BLACKMUN delivered the opinion of the Court.

In this case we must determine whether the decision of the Pension Benefit Guaranty Corporation (PBGC) to restore certain pension plans under § 4047 of the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 1028, as amended, 100 Stat. 237, 29 U. S. C. § 1347, was, as the Court of Appeals concluded, arbitrary and capricious or contrary to law, within the meaning of the Administrative Procedure Act (APA), 5 U. S. C. § 706.

I

Petitioner PBGC is a wholly owned United States Government corporation, see 29 U. S. C. § 1302, modeled after the

*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Starr, Deputy Solicitor General Shapiro,* and *Christopher J. Wright;* for the American Society of Pension Actuaries by *Chester J. Salkind;* for Armco et al. by *Benjamin R. Civiletti* and *W. Warren Hamel;* and for the Retired Employees Benefits Coalition, Inc., by *Bruce E. Davis.*

Briefs of *amici curiae* urging affirmance were filed for the State of Ohio by *Anthony J. Celebrezze, Jr.,* Attorney General, and *Loren L. Braverman;* and for the American Federation of Labor and Congress of Industrial Organizations et al. by *Robert M. Weinberg, Jeremiah A. Collins, Peter O. Shinevar, Laurence Gold, Bernard Kleiman, Carl B. Frankel, Paul Whitehead,* and *Karin S. Feldman.*

William J. Kilberg and *Baruch A. Fellner* filed a brief for Wheeling-Pittsburgh Steel Corp. as *amicus curiae.*

Federal Deposit Insurance Corporation. See 120 Cong. Rec. 29950 (1974) (statement of Sen. Bentsen). The Board of Directors of the PBGC consists of the Secretaries of the Treasury, Labor, and Commerce. 29 U. S. C. § 1302(d). The PBGC administers and enforces Title IV of ERISA. Title IV includes a mandatory Government insurance program that protects the pension benefits of over 30 million private-sector American workers who participate in plans covered by the Title.[1] In enacting Title IV, Congress sought to ensure that employees and their beneficiaries would not be completely "deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans." *Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co.*, 467 U. S. 717, 720 (1984). See also *Nachman Corp.* v. *Pension Benefit Guaranty Corporation*, 446 U. S. 359, 361–362, 374–375 (1980).

When a plan covered under Title IV terminates with insufficient assets to satisfy its pension obligations to the employees, the PBGC becomes trustee of the plan, taking over the plan's assets and liabilities. The PBGC then uses the plan's assets to cover what it can of the benefit obligations. See 29 U. S. C. § 1344 (1982 ed. and Supp. IV). The PBGC then must add its own funds to ensure payment of most of the remaining "nonforfeitable" benefits, *i. e.*, those benefits to

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[1] Title IV covers virtually all "defined benefit" pension plans sponsored by private employers. A defined benefit plan is one that promises to pay employees, upon retirement, a fixed benefit under a formula that takes into account factors such as final salary and years of service with the employer. See 29 U. S. C. § 1321. It is distinguished from a "defined contribution" plan (also known as an "individual account" plan), under which the employer typically contributes a percentage of an employee's compensation to an account, and the employee is entitled to the account upon retirement. See 29 U. S. C. §§ 1002(34) and (35). ERISA insurance does not cover defined contribution plans because employees are not promised any particular level of benefits; instead, they are promised only that they will receive the balances in their individual accounts.

which participants have earned entitlement under the plan terms as of the date of termination. §§ 1301(a)(8), 1322(a) and (b). ERISA does place limits on the benefits PBGC may guarantee upon plan termination, however, even if an employee is entitled to greater benefits under the terms of the plan. See 29 CFR § 2621.3(a)(2) and App. A (1989); 29 U. S. C. § 1322(b)(3)(B). In addition, benefit increases resulting from plan amendments adopted within five years of the termination are not paid in full. Finally, active plan participants (current employees) cease to earn additional benefits under the plan upon its termination and lose entitlement to most benefits not yet fully earned as of the date of plan termination. 29 U. S. C. §§ 1322(a) and (b), 1301(a)(8); 29 CFR § 2613.6 (1989).

The cost of the PBGC insurance is borne primarily by employers that maintain ongoing pension plans. Sections 4006 and 4007 of ERISA require these employers to pay annual premiums. See 29 U. S. C. §§ 1306 and 1307 (1982 ed. and Supp. IV). The insurance program is also financed by statutory liability imposed on employers who terminate underfunded pension plans. Upon termination, the employer becomes liable to the PBGC for the benefits that the PBGC will pay out.[2] Because the PBGC historically has recovered only a small portion of that liability, Congress repeatedly has been forced to increase the annual premiums. Even with these increases, the PBGC in its most recent annual report noted liabilities of $4 billion and assets of only $2.4 billion, leaving a deficit of over $1.5 billion.

As noted above, plan termination is the insurable event under Title IV. Plans may be terminated "voluntarily" by an employer or "involuntarily" by the PBGC. An employer may terminate a plan voluntarily in one of two ways. It may proceed with a "standard termination" only if it has sufficient

[2] Prior to 1987, employers were liable for only 75% of PBGC's expenditures. In that year, Congress eliminated the 75% cap. See Pension Protection Act, Pub. L. 100–203, 101 Stat. 1330–333.

assets to pay all benefit commitments. A standard termination thus does not implicate PBGC insurance responsibilities. If an employer wishes to terminate a plan whose assets are insufficient to pay all benefits, the employer must demonstrate that it is in financial "distress" as defined in 29 U. S. C. § 1341(c) (1982 ed., Supp. IV). Neither a standard nor a distress termination by the employer, however, is permitted if termination would violate the terms of an existing collective-bargaining agreement. 29 U. S. C. § 1341(a)(3).

The PBGC, though, may terminate a plan "involuntarily," notwithstanding the existence of a collective-bargaining agreement. *Ibid.* Section 4042 of ERISA provides that the PBGC may terminate a plan whenever it determines that:

> "(1) the plan has not met the minimum funding standard required under section 412 of title 26, or has been notified by the Secretary of the Treasury that a notice of deficiency under section 6212 of title 26 has been mailed with respect to the tax imposed under section 4791(a) of title 26,
>
> "(2) the plan will be unable to pay benefits when due,
>
> "(3) the reportable event described in section 1343(b)(7) of this title has occurred, or
>
> "(4) the possible long-run loss of the [PBGC] with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated." 29 U. S. C. § 1342(a).

Termination can be undone by PBGC. Section 4047 of ERISA, 29 U. S. C. § 1347, provides:

> "In the case of a plan which has been terminated under section 1341 or 1342 of this title the [PBGC] is authorized in any such case in which [it] determines such action to be appropriate and consistent with its duties under this subchapter, to take such action as may be necessary to restore the plan to its pretermination status, including, but not limited to, the transfer to the employer or a plan

> administrator of control of part or all of the remaining assets and liabilities of the plan."

When a plan is restored, full benefits are reinstated, and the employer, rather than the PBGC, again is responsible for the plan's unfunded liabilities.

II

This case arose after respondent The LTV Corporation (LTV Corp.) and many of its subsidiaries, including LTV Steel Company Inc. (LTV Steel), (collectively LTV), in July 1986 filed petitions for reorganization under Chapter 11 of the Bankruptcy Code. At that time, LTV Steel was the sponsor of three defined benefit pension plans (Plans) covered by Title IV of ERISA. Two of the Plans were the products of collective-bargaining negotiations with the United Steelworkers of America (Steelworkers). The third was for nonunion salaried employees. Chronically underfunded, the Plans, by late 1986, had unfunded liabilities for promised benefits of almost $2.3 billion. Approximately $2.1 billion of this amount was covered by PBGC insurance.

It is undisputed that one of LTV Corp.'s principal goals in filing the Chapter 11 petitions was the restructuring of LTV Steel's pension obligations, a goal which could be accomplished if the Plans were terminated and responsibility for the unfunded liabilities was placed on the PBGC. LTV Steel then could negotiate with its employees for new pension arrangements. LTV, however, could not voluntarily terminate the Plans because two of them had been negotiated in collective bargaining. LTV therefore sought to have the PBGC terminate the Plans.

To that end, LTV advised the PBGC in 1986 that it could not continue to provide complete funding for the Plans. PBGC estimated that, without continued funding, the Plans' $2.1 billion underfunding could increase by as much as $65 million by December 1987 and by another $63 million by December 1988, unless the Plans were terminated. Moreover, extensive plant shutdowns were anticipated. These shut-

downs, if they occurred before the Plans were terminated, would have required the payment of significant "shutdown benefits." The PBGC estimated that such benefits could increase the Plans' liabilities by as much as $300 million to $700 million, of which up to $500 million would be covered by PBGC insurance. Confronted with this information, the PBGC, invoking § 4042(a)(4) of ERISA, 29 U. S. C. § 1342(a)(4), determined that the Plans should be terminated in order to protect the insurance program from the unreasonable risk of large losses, and commenced termination proceedings in the District Court. With LTV's consent, the Plans were terminated effective January 13, 1987.[3]

Because the Plans' participants lost some benefits as a result of the termination, the Steelworkers filed an adversary action against LTV in the Bankruptcy Court, challenging the termination and seeking an order directing LTV to make up the lost benefits. This action was settled, with LTV and the Steelworkers negotiating an interim collective-bargaining agreement that included new pension arrangements intended to make up benefits that plan participants lost as a result of the termination. New payments to retirees were based explicitly upon "a percentage of the difference between the benefit that was being paid under the Prior Plans and the amount paid by the PBGC." App. 181. Retired participants were thereby placed in substantially the same positions they would have occupied had the old Plans never been terminated. The new agreements respecting active participants were also designed to replace benefits under the old Plans that were not insured by the PBGC, such as early retirement benefits and shutdown benefits. With respect to shutdown benefits, LTV stated in Bankruptcy Court that the new benefits totaled "75% of benefits lost as a result of plan termination."

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[3] The Steelworkers appealed the District Court's judgment (giving effect to the PBGC's termination) to the United States Court of Appeals for the Second Circuit. That court affirmed. *Jones & Laughlin Hourly Pension Plan* v. *LTV Corp.*, 824 F. 2d 197 (1987).

Id., at 159. With respect to some other kinds of benefits for active participants, the new arrangements provided 100% or more of the lost benefits. *Id.*, at 235.

The PBGC objected to these new pension agreements, characterizing them as "follow-on" plans. It defines a follow-on plan as a new benefit arrangement designed to wrap around the insurance benefits provided by the PBGC in such a way as to provide both retirees and active participants substantially the same benefits as they would have received had no termination occurred. The PBGC's policy against follow-on plans stems from the agency's belief that such plans are "abusive" of the insurance program and result in the PBGC's subsidizing an employer's ongoing pension program in a way not contemplated by Title IV. The PBGC consistently has made clear its policy of using its restoration powers under § 4047 if an employer institutes an abusive follow-on plan. In three opinion letters, two in 1981 and one in 1986, the PBGC stated: "[T]he termination insurance program of Title IV was not intended to subsidize an employer's ongoing retirement program." App. to Pet. for Cert. 162a, 167a, 173a. Accordingly, the PBGC has indicated that if an employer adopts a new plan that, "together with the guaranteed benefits paid by the PBGC under the terminated plan, provide[s] for the payment of, accrual of, or eligibility for benefits that are substantially the same as those provided under the terminated plan," App. 229, the PBGC will view the plan as an attempt to shift liability to the termination insurance program while continuing to operate the plan.

LTV ignored the PBGC's objections to the new pension arrangements and asked the Bankruptcy Court for permission to fund the follow-on plans. The Bankruptcy Court granted LTV's request. In doing so, however, it noted that the PBGC "may have legal options or avenues that it can assert administratively . . . to implement its policy goals. Nothing done here tonight precludes the PBGC from pursuing these options. . . ." *Id.*, at 261.

In early August 1987, the PBGC determined that the financial factors on which it had relied in terminating the Plans had changed significantly. Of particular significance to the PBGC was its belief that the steel industry, including LTV Steel, was experiencing a dramatic turnaround. As a result, the PBGC concluded it no longer faced the imminent risk, central to its original termination decision, of large unfunded liabilities stemming from plant shutdowns. Later that month, the PBGC's internal working group made a recommendation, based upon LTV's improved financial circumstances and its follow-on plans, to the PBGC's Executive Director to restore the Plans under the PBGC's § 4047 powers. After consulting the PBGC's Board of Directors, which agreed with the working group that restoration was appropriate, the Executive Director decided to restore the Plans.[4]

The Director issued a notice of restoration on September 22, 1987, indicating the PBGC's intent to restore the terminated Plans. The PBGC notice explained that the restoration decision was based on (1) LTV's establishment of "a retirement program that results in an abuse of the pension plan termination insurance system established by Title IV of ERISA," and (2) LTV's "improved financial circumstances." See App. to Pet. for Cert. 182a.[5] Restoration meant that

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[4] Thereafter, the Executive Director offered to meet with LTV to "consider any additional information [it] might wish to supply." App. 348. Representatives of LTV and the PBGC then met on September 19 and 21, 1987. At these meetings, LTV officials expressed concern about the timing of the restoration decision and indicated that restoration would give rise to time-consuming litigation, which would cast doubt on the bankruptcy reorganization, thereby imposing hardship on other creditors.

[5] The PBGC also gave a third reason for restoration—LTV's "demonstrated willingness to fund employee retirement arrangements." See App. to Pet. for Cert. 182a. Before the Court of Appeals for the Second Circuit, the PBGC conceded that this reason was not an independent basis for the restoration decision but rather was "subsumed [with]in the other two" grounds. See 875 F. 2d 1008, 1020 (1989). Accordingly, the Court of Appeals did not address this explanation for restoration, and neither do we.

the Plans were ongoing, and that LTV again would be responsible for administering and funding them.

LTV refused to comply with the restoration decision. This prompted the PBGC to initiate an enforcement action in the District Court.[6] The court vacated the PBGC's restoration decision, finding, among other things, that the PBGC had exceeded its authority under § 4047. See *In re Chateaugay Corp.*, 87 B. R. 779 (SDNY 1988).

The Court of Appeals for the Second Circuit affirmed, holding that the PBGC's restoration decision was "arbitrary and capricious" or contrary to law under the APA, 5 U. S. C. § 706(2)(A), in various ways. 875 F. 2d 1008, 1015–1021 (1989). The court first concluded that the PBGC's action was arbitrary and capricious because the PBGC focused "inordinately on ERISA" to the exclusion of other laws. *Id.*, at 1016. The court then found the agency's anti-follow-on policy to be contrary to law because the "legislative history of section 4047 reveals no indication that Congress intended the establishment of successive [*i. e.*, follow-on] benefit plans to be a ground for restoration." *Id.*, at 1017. The court also found the PBGC's other basis for restoration—improved financial condition—inadequate because the PBGC did not explain many of its economic assumptions. *Id.*, at 1018–1020. Finally, the court concluded that the agency's restoration decision was arbitrary and capricious because the PBGC's decisionmaking process of informal adjudication lacked adequate procedural safeguards. *Id.*, at 1021.

Because of the significant administrative law questions raised by this case, and the importance of the PBGC's insurance program, we granted certiorari. 493 U. S. 932 (1989).

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[6] Meanwhile, LTV filed an action in the Bankruptcy Court alleging that restoration would violate the automatic stay provision of the Bankruptcy Code. See 11 U. S. C. § 362(a). The District Court granted the PBGC's motion to withdraw LTV's action from the Bankruptcy Court pursuant to 28 U. S. C. § 157(d), and considered the two actions together. See *In re Chateaugay Corp.*, 86 B. R. 33 (SDNY 1987).

III

A

The Court of Appeals first held that the restoration decision was arbitrary and capricious under § 706(2)(A) because the PBGC did not take account of all the areas of law the court deemed relevant to the restoration decision. The court expressed the view that "[b]ecause ERISA, bankruptcy and labor law are involved in the case at hand, there must be a showing on the administrative record that PBGC, before reaching its decision, considered all of these areas of the law, and to the extent possible, honored the policies underlying them." 875 F. 2d, at 1015. The court concluded that the administrative record did not reflect thorough and explicit consideration by the PBGC of the "policies and goals" of each of the three bodies of law. *Id.*, at 1016. As the court put it, the PBGC "focused inordinately on ERISA." *Ibid.* The Court of Appeals did not hold that the PBGC's decision *actually conflicted* with any provision in the bankruptcy or labor laws, or that the PBGC's action "trench[ed] upon the . . . jurisdiction" of another agency. See *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156, 173 (1962). Rather, the court held that because labor law and bankruptcy law are "involved in the case at hand," the PBGC had an affirmative obligation, which had not been met, to address them. 875 F. 2d, at 1015.

The PBGC contends that the Court of Appeals misapplied the general rule that an agency must take into consideration all relevant factors, see *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402, 416 (1971), by requiring the agency explicitly to consider and discuss labor and bankruptcy law. We agree.

First, and most important, we do not think that the requirement imposed by the Court of Appeals upon the PBGC can be reconciled with the plain language of § 4047, under which the PBGC is operating in this case. This section gives the PBGC the power to restore terminated plans in any case

in which the PBGC determines such action to be "appropriate and consistent with its duties *under this title* [*i. e.*, Title IV of ERISA]" (emphasis added). The statute does not direct the PBGC to make restoration decisions that further the "public interest" generally, but rather empowers the agency to restore when restoration would further the interests that Title IV of ERISA is designed to protect. Given this specific and unambiguous statutory mandate, we do not think that the PBGC did or could focus "inordinately" on ERISA in making its restoration decision.

Even if Congress' directive to the PBGC had not been so clear, we are not entirely sure that the Court of Appeals' holding makes good sense as a general principle of administrative law. The PBGC points out problems that would arise if federal courts routinely were to require each agency to take explicit account of public policies that derive from federal statutes other than the agency's enabling Act. To begin with, there are numerous federal statutes that could be said to embody countless policies. If agency action may be disturbed whenever a reviewing court is able to point to an arguably relevant statutory policy that was not explicitly considered, then a very large number of agency decisions might be open to judicial invalidation.

The Court of Appeals' directive that the PBGC give effect to the "policies and goals" of other statutes, apart from what those statutes actually provide,[7] is questionable for another reason as well. Because the PBGC can claim no expertise in the labor and bankruptcy areas, it may be ill equipped to undertake the difficult task of discerning and applying the "policies and goals" of those fields. This Court recently observed:

> "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the

[7] It is worth noting that the provisions of ERISA itself do take account of other areas of federal law. For example, as noted above, an employer may not voluntarily terminate a plan if to do so would violate the terms of a collective-bargaining agreement. 29 U. S. C. § 1341(a)(3).

> very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U. S. 522, 525–526 (1987).

For these reasons, we believe the Court of Appeals erred in holding that the PBGC's restoration decision was arbitrary and capricious because the agency failed adequately to consider principles and policies of bankruptcy law and labor law.

B

The Court of Appeals also rejected the grounds for restoration that the PBGC *did* assert and discuss. The court found that the first ground the PBGC proffered to support the restoration—its policy against follow-on plans—was contrary to law because there was no indication in the text of the restoration provision, § 4047, or its legislative history that Congress intended the PBGC to use successive benefit plans as a basis for restoration. The PBGC argues that in reaching this conclusion the Court of Appeals departed from traditional principles of statutory interpretation and judicial review of agency construction of statutes. Again, we must agree.

In *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), we set forth the general principles to be applied when federal courts review an agency's interpretation of the statute it implements:

> "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an

> administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*, at 842–843 (footnotes omitted).

Here, the PBGC has interpreted § 4047 as giving it the power to base restoration decisions on the existence of follow-on plans. Our task, then, is to determine whether any clear congressional desire to avoid restoration decisions based on successive pension plans exists, and, if the answer is in the negative, whether the PBGC's policy is based upon a permissible construction of the statute. See *Mead Corp.* v. *Tilley*, 490 U. S. 714 (1989) (applying *Chevron* principles to the PBGC's construction of ERISA).

Turning to the first half of the inquiry, we observe that the text of § 4047 does not evince a clear congressional intent to deprive the PBGC of the ability to base restoration decisions on the existence of follow-on plans. To the contrary, the textual grant of authority to the PBGC embodied in this section is broad. As noted above, the section authorizes the PBGC to restore terminated plans "in any such case in which [the PBGC] determines such action to be appropriate and consistent with its duties under [Title IV of ERISA]." 29 U. S. C. § 1347. The PBGC's duties consist primarily of furthering the statutory purposes of Title IV identified by Congress. These are:

> "(1) to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants,
>
> "(2) to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans to which this subchapter applies, and
>
> "(3) to maintain premiums established by [the PBGC] under section 1306 of this title at the lowest level consistent with carrying out the obligations under this subchapter." 29 U. S. C. § 1302(a).

On their face, of course, none of these statutorily identified purposes has anything to say about the precise question at issue—the use of follow-on plans as a basis for restoration decisions.

Nor do any of the other traditional tools of statutory construction compel the conclusion that Congress intended that the PBGC not base its restoration decisions on follow-on plans. The Court of Appeals relied extensively on passages in the legislative history of the 1974 enactment of ERISA which suggest that Congress considered financial recovery a valid basis for restoration, but which make no mention of follow-on plans. The court reasoned that because follow-ons were not among the bases for restoration discussed by Members of Congress, that body must have intended that the existence of follow-ons *not* be a reason for restoring pension plans. See 875 F. 2d, at 1017.

We do not agree with this conclusion. We first note that the discussion in the legislative history concerning grounds for restoration was not limited to the financial-recovery example. The House Conference Report indicated that restoration was appropriate if financial recovery or "some other factor made termination no longer advisable." H. R. Conf. Rep. No. 93–1280, p. 378 (1974). Moreover, and more generally, the language of a statute—particularly language expressly granting an agency broad authority—is not to be regarded as modified by examples set forth in the legislative history. An example, after all, is just that: an illustration of a statute's operation in practice. It is not, as the Court of Appeals apparently thought, a definitive interpretation of a statute's scope. We see no suggestion in the legislative history that Congress intended its list of examples to be exhaustive. Under these circumstances, we conclude that ERISA's legislative history does not suggest "clear congressional intent" on the question of follow-on plans.

The Court of Appeals also relied on the legislative history of the 1987 amendments to ERISA effected by the Pension

Protection Act, Pub. L. 100–203, 101 Stat. 1330–333. See 875 F. 2d, at 1017. This history reveals that Congress in 1987 considered, but did not enact, a provision that expressly would have authorized the PBGC to prohibit follow-on plans. But subsequent legislative history is a "hazardous basis for inferring the intent of an earlier" Congress. *United States* v. *Price*, 361 U. S. 304, 313 (1960). It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law. See, *e. g.*, *United States* v. *Wise*, 370 U. S. 405, 411 (1962). Congressional inaction lacks "persuasive significance" because "several equally tenable inferences" may be drawn from such inaction, "including the inference that the existing legislation already incorporated the offered change." *Ibid.* These admonitions are especially apt in the instant case because Congress was aware of the action taken by the PBGC with respect to LTV at the time it rejected the proposed amendment. See H. R. Rep. No. 100–391, pt. 1, pp. 106–107 (1987). Despite Congress' awareness of the PBGC's belief that the adoption of follow-on plans was a ground for restoration, Congress did not amend § 4047 to restrict the PBGC's discretion. The conclusion that Congress thought the PBGC was properly exercising its authority is at least as plausible as any other. Thus, the legislative history surrounding the 1987 amendments provides no more support than the 1974 legislative history for the Court of Appeals' holding that the PBGC's interpretation of § 4047 contravened clear congressional will.

Having determined that the PBGC's construction is not contrary to clear congressional intent, we still must ascertain whether the agency's policy is based upon a "permissible" construction of the statute, that is, a construction that is "rational and consistent with the statute." *NLRB* v. *Food & Commercial Workers*, 484 U. S. 112, 123 (1987); see also *Sullivan* v. *Everhart*, 494 U. S. 83 (1990). Respondents argue that the PBGC's anti-follow-on policy is irrational be-

cause, as a practical matter, no purpose is served when the PBGC bases a restoration decision on something other than the improved financial health of the employer. According to respondents, "financial improvement [is] both a necessary and a sufficient condition for restoration. The agency's asserted abuse policy . . . is *logically irrelevant* to the restoration decision." Brief for Respondents LTV Corp. and LTV Steel 33 (emphasis added). We think not. The PBGC's anti-follow-on policy is premised on the belief, which we find eminently reasonable, that employees will object more strenuously to a company's original decision to terminate a plan (or to take financial steps that make termination likely) if the company cannot use a follow-on plan to put the employees in the same (or a similar) position after termination as they were in before. The availability of a follow-on plan thus would remove a significant check—employee resistance—against termination of a pension plan.

Consequently, follow-on plans may tend to frustrate one of the objectives of ERISA that the PBGC is supposed to accomplish—the "continuation and maintenance of voluntary private pension plans." 29 U. S. C. § 1302(a)(1). In addition, follow-on plans have a tendency to increase the PBGC's deficit and increase the insurance premiums all employers must pay, thereby frustrating another related statutory objective—the maintenance of low premiums. See 29 U. S. C. § 1302(a)(3). In short, the PBGC's construction based upon its conclusion that the existence of follow-on plans will lead to more plan terminations and increased PBGC liabilities is "assuredly a permissible one." *Everhart*, 494 U. S., at 93. Indeed, the judgments about the way the real world works that have gone into the PBGC's anti-follow-on policy are precisely the kind that agencies are better equipped to make than are courts.[8] This practical agency expertise is one of the princi-

[8] JUSTICE STEVENS suggests that the possibility of follow-on plans will make employees "no less likely to object to the financial steps that will lead to [an involuntary] plan termination because they would have no basis for

pal justifications behind *Chevron* deference. See 467 U. S., at 865.

None of this is to say that financial improvement will never be relevant to a restoration decision. Indeed, if an employer's financial situation remains so dire that restoration would lead inevitably to immediate retermination, the PBGC may decide not to restore a terminated plan even where the employer has instituted a follow-on plan.[9] For present purposes, however, it is enough for us to decide that where, as here, there is no suggestion that immediate retermination of the plans will be necessary,[10] it is rational for the PBGC to disfavor follow-on plans.[11]

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belief that a union will insist on [the adoption of follow-on plans] when, perhaps years later, the PBGC involuntarily terminates the plan." *Post*, at 659 (dissenting opinion). There is no reason to believe, however, that financial decisions that lead to an involuntary termination always or ordinarily occur far in advance of the termination itself. Thus, as JUSTICE STEVENS himself acknowledges with respect to a voluntary termination, "those who could object to [the events resulting in an involuntary termination may also be] reasonably assured of receiving benefits when the insurance is paid." *Ibid.* Moreover, even when an involuntary termination does not occur until well after the financial decisions that lead to termination are made, we think the PBGC's apparent belief that employee resistance to those financial decisions will be lessened to some degree by the prospect of follow-on plans after termination is not an unreasonable one.

[9] For example, the PBGC did not restore a fourth LTV plan that had been terminated because, among other things, the plan had insufficient assets to pay benefits when due. App. 318.

[10] In this respect we observe that in its notice of restoration, the PBGC relied on the *long-term* potential for PBGC liability. See 29 U. S. C. § 1342(a)(4). The PBGC did not conclude that the Plans were in any imminent danger or that LTV could not meet the statutory minimum-funding requirements. In fact, the PBGC observed in the notice that LTV did have "sufficient cash" to cover current benefits. See App. to Pet. for Cert. 183a. No party has suggested to this Court that, at the time of restoration, immediate retermination, either voluntary or involuntary, was likely.

[11] Because we, like the Court of Appeals, read the PBGC's notice of restoration as indicating that the PBGC's anti-follow-on policy constitutes an independent ground for the restoration decision, we need not address that

C

Finally, we consider the Court of Appeals' ruling that the agency procedures were inadequate in this particular case. Relying upon a passage in *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U. S. 281, 288, n. 4 (1974), the court held that the PBGC's decision was arbitrary and capricious because the "PBGC neither apprised LTV of the material on which it was to base its decision, gave LTV an adequate opportunity to offer contrary evidence, proceeded in accordance with ascertainable standards . . . , nor provided [LTV] a statement showing its reasoning in applying those standards." 875 F. 2d, at 1021. The court suggested that on remand the agency was required to do each of these things.

The PBGC argues that this holding conflicts with *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519 (1978), where, the PBGC contends, this Court made clear that when the Due Process Clause is not implicated and an agency's governing statute contains no specific procedural mandates, the APA establishes the maximum procedural requirements a reviewing court may impose on agencies. Although *Vermont Yankee* concerned additional procedures imposed by the Court of Appeals for the District of Columbia Circuit on the Atomic Energy Commission when the agency was engaging in informal rulemaking, the PBGC argues that the informal adjudication process by which the restoration decision was made should be governed by the same principles.

Respondents counter by arguing that courts, under some circumstances, do require agencies to undertake additional procedures. As support for this proposition, they rely on *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402 (1971). In *Overton Park*, the Court concluded that the

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court's ruling that the PBGC's methodology with regard to the other asserted basis for restoration—improved financial condition—was flawed.

Secretary of Transportation's "*post hoc* rationalizations" regarding a decision to authorize the construction of a highway did not provide "an [a]dequate basis for [judicial] review" for purposes of the APA, 5 U. S. C. § 706. *Id.*, at 419. Accordingly, the Court directed the District Court on remand to consider evidence that shed light on the Secretary's reasoning at the time he made the decision. Of particular relevance for present purposes, the Court in *Overton Park* intimated that one recourse for the District Court might be a remand to the agency for a fuller explanation of the agency's reasoning at the time of the agency action. See *id.*, at 420–421. Subsequent cases have made clear that remanding to the agency in fact is the preferred course. See *Florida Power & Light Co.* v. *Lorion*, 470 U. S. 729, 744 (1985) ("[I]f the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation"). Respondents contend that the instant case is controlled by *Overton Park* rather than *Vermont Yankee*, and that the Court of Appeals' ruling was thus correct.

We believe that respondents' argument is wide of the mark. We begin by noting that although one initially might feel that there is some tension between *Vermont Yankee* and *Overton Park*, the two cases are not necessarily inconsistent. *Vermont Yankee* stands for the general proposition that courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA. See 435 U. S., at 524. At most, *Overton Park* suggests that § 706 (2)(A), which directs a court to ensure that an agency action is not arbitrary and capricious or otherwise contrary to law, imposes a general "procedural" requirement of sorts by mandating that an agency take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency's rationale at the time of decision.

Here, unlike in *Overton Park*, the Court of Appeals did not suggest that the administrative record was inadequate to enable the court to fulfill its duties under § 706. Rather, to support its ruling, the court focused on "fundamental fairness" to LTV. 875 F. 2d, at 1020–1021. With the possible exception of the absence of "ascertainable standards"—by which we are not exactly sure what the Court of Appeals meant—the procedural inadequacies cited by the court all relate to LTV's role in the PBGC's decisionmaking process. But the court did not point to any provision in ERISA or the APA which gives LTV the procedural rights the court identified. Thus, the court's holding runs afoul of *Vermont Yankee* and finds no support in *Overton Park*.

Nor is *Arkansas-Best*, the case on which the Court of Appeals relied, to the contrary. The statement relied upon (which was dictum) said: "A party is entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it." 419 U. S., at 288, n. 4. That statement was entirely correct in the context of *Arkansas-Best*, which involved a formal adjudication by the Interstate Commerce Commission pursuant to the trial-type procedures set forth in §§ 5, 7 and 8 of the APA, 5 U. S. C. §§ 554, 556–557, which include requirements that parties be given notice of "the matters of fact and law asserted," § 554(b)(3), an opportunity for "the submission and consideration of facts [and] arguments," § 554(c)(1), and an opportunity to submit "proposed findings and conclusions" or "exceptions," § 557(c)(1), (2). See 5 U. S. C. § 554(a); 49 Stat. 548, 54 Stat. 913, formerly codified at 49 U. S. C. §§ 17, 305(h) (1976 ed.), repealed 92 Stat. 1466; 96 Stat. 2444. The determination in this case, however, was lawfully made by informal adjudication, the minimal requirements for which are set forth in the APA, 5 U. S. C. § 555, and do not include such elements. A failure to provide them where the Due Process

Clause itself does not require them (which has not been asserted here) is therefore not unlawful.

IV

We conclude that the PBGC's failure to consider all potentially relevant areas of law did not render its restoration decision arbitrary and capricious. We also conclude that the PBGC's anti-follow-on policy, an asserted basis for the restoration decision, is not contrary to clear congressional intent and is based on a permissible construction of § 4047. Finally, we find the procedures employed by the PBGC to be consistent with the APA. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE WHITE, with whom JUSTICE O'CONNOR joins, concurring in part and dissenting in part.

I join the Court's opinion except for the statement of the judgment and footnote 11. In particular, I agree that the anti-follow-on policy at issue here is not contrary to the statute and that the PBGC would not have been prohibited from applying that policy as a basis for restoration in this case. Unlike the Court, however, I cannot read the notice of restoration as relying on the anti-follow-on policy and respondents' alleged improved financial position as alternative, independent grounds for restoration. The notice, as I read it, clearly rested on both grounds in conjunction. Furthermore, it would make good sense to rely on improved financial position, for without it there would be a risk of an early retermination of the plan. At the very least, there is serious doubt about the matter, and if the Court of Appeals was correct that the PBGC's assessment of respondents' financial position was inadequate—and I think it was—the case should be remanded to the agency to consider whether the anti-follow-on plan by itself provides sufficient grounds for a restoration order.

I realize that the PBGC represented at oral argument that it had relied on its anti-follow-on policy and on respondents' improved financial condition as separate and independent grounds for the restoration, Tr. of Oral Arg. 25–26, but counsel's *post hoc* rationalizations are no substitute for adequate action by the agency itself. See *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mutual Automobile Insurance Co.*, 463 U. S. 29, 50 (1983). Nor may the PBGC's restoration order be upheld even though the agency might reach the same result on remand, relying only on the anti-follow-on policy. "[The agency's] action must be measured by what [it] did, not by what it might have done. . . . The [agency's] action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interests protected by the Act." *SEC* v. *Chenery Corp.*, 318 U. S. 80, 93–94 (1943).

I would therefore reverse the Court of Appeals in part, affirm in part, and remand with directions to return the case to the PBGC.

JUSTICE STEVENS, dissenting.

In my opinion, at least with respect to ERISA plans that the PBGC has terminated involuntarily, the use of its restoration power under § 4047 to prohibit "follow-on" plans is contrary to the agency's statutory mandate. Unless there was a sufficient improvement in LTV's financial condition to justify the restoration order, I believe it should be set aside. I, therefore, would remand the case for a determination of whether that ground for the agency decision is adequately supported by the record.

A company that is undergoing reorganization under Chapter 11 of the Bankruptcy Code continues to operate an ongoing business and must have a satisfactory relationship with its work force in order to complete the reorganization process successfully. If its previous pension plans have been involuntarily terminated with the consequence that the PBGC has

assumed the responsibility for discharging a significant share of the company's pension obligations, that responsibility by the PBGC is an important resource on which the company has a right to rely during the reorganization process. It may use the financial cushion to fund capital investments, to pay current salary, or to satisfy contractual obligations, including the obligation to pay pension benefits. As long as the company uses its best efforts to complete the reorganization (and, incidentally, to reimburse the PBGC for payments made to its former employees to the extent required by ERISA),[1] the PBGC does not have any reason to interfere with managerial decisions that the company makes and the bankruptcy court approves. Whether the company's resources are dedicated to current expenditures or capital investments and whether the package of employee benefits that is provided to the work force is composed entirely of wages, vacation pay, and health insurance, on the one hand, or includes additional pension benefits, on the other, should be matters of indifference to the PBGC. Indeed, if it was faithful to the statement of congressional purposes in ERISA, see *ante*, at 648, it should favor an alternative that increases the company's use and maintenance of pension plans and that provides for continued payment to existing plan beneficiaries. The follow-on plans, in my opinion, are wholly consistent with the purposes of ERISA.

According to the Court, the PBGC policy is premised on the belief that if the company cannot adopt a follow-on plan, the employees will object more strenuously (1) in the case of a

[1] At the time of the termination of the LTV plans, the PBGC was entitled to recover only 75 percent of the amounts expended to discharge LTV's pension obligations. The statute has since been amended to authorize a 100 percent recovery. LTV represents that if the restoration order is upheld, and if—as seems highly probable—it is promptly followed by another termination, the PBGC bankruptcy claim will increase from about $2 billion to more than $3 billion. Brief for Respondents LTV Corp. and LTV Steel 33, n. 21. The PBGC, of course, does not assert this change as a justification for the restoration order.

voluntary termination, to the "company's original decision to terminate a plan"; and (2) in the case of an involuntary termination, to the company's decision "to take financial steps that make termination likely." *Ante*, at 651. That belief might be justified in the case of a voluntary termination of an ERISA plan. Since the follow-on plan would be adopted immediately after plan termination, those who could object to the insurable event are also reasonably assured of receiving benefits when the insurance is paid.[2] That view is wholly unwarranted, however, in the case of an involuntary termination. The insurable event, plan termination, is within the control of the PBGC, which presumably has determined that the company does not have the financial resources to meet its current pension obligations. Even if the company could adopt a follow-on plan, the employees will be no less likely to object to the financial steps that will lead to plan termination because they would have no basis for belief that a union will insist on that course when, perhaps years later, the PBGC involuntarily terminates the plan. The safety that comes from a healthy pension plan will not be overcome by the hope that a future union will remember the interests of its retirees and former employees. Plan restoration in these circumstances is not a legitimate curative to the problem of moral hazard, but rather constitutes punishment of both labor and management for the imprudence of their predecessors.

In the case of an involuntary termination, if a mistake in the financial analysis is made, or if there is a sufficient change in the financial condition of the company to justify a reinstatement of the company's obligation, the PBGC should use its restoration powers. Without such a financial justification, however, there is nothing in the statute to authorize the PBGC's use of that power to prevent a company from creat-

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[2] The three opinion letters identifying the PBGC policy concerning follow-on plans all involved voluntary terminations. See App. to Pet. for Cert. 159a, 165a, 172a. The restoration order entered in this case was unprecedented.

ing or maintaining the kind of employee benefit program that the statute was enacted to encourage.

Accordingly, I respectfully dissent.

ELI LILLY & CO. *v.* MEDTRONIC, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 89–243. Argued February 26, 1990—Decided June 18, 1990

Claiming infringement of two of its patents, petitioner Eli Lilly's predecessor-in-interest filed suit to enjoin respondent Medtronic's testing and marketing of a medical device. Medtronic defended on the ground that its activities were undertaken to develop and submit to the Government information necessary to obtain premarketing approval for the device under § 515 of the Federal Food, Drug, and Cosmetic Act (FDCA) and were therefore exempt from a finding of infringement under 35 U. S. C. § 271(e)(1), which authorizes the manufacture, use, or sale of a patented device "solely for uses reasonably related to the development and submission of information under a Federal law which regulates the manufacture, use, or sale of drugs." The District Court concluded that § 271(e)(1) does not apply to medical devices and, after a jury trial, entered judgment on verdicts for Eli Lilly. The Court of Appeals reversed on the ground that, under § 271(e)(1), Medtronic's activities could not constitute infringement if they were related to obtaining regulatory approval under the FDCA, and remanded for the District Court to determine whether that condition had been met.

Held: Section 271(e)(1) exempts from infringement the use of patented inventions reasonably related to the development and submission of information needed to obtain marketing approval of medical devices under the FDCA. Pp. 665–679.

(a) The statutory phrase of § 271(e)(1), "a Federal law which regulates the manufacture, use, or sale of drugs," is ambiguous. It is somewhat more naturally read (as Medtronic asserts) to refer to the entirety of any Act, including the FDCA, at least some of whose provisions regulate drugs, rather than (as Eli Lilly contends) to only those individual provisions of federal law that regulate drugs. However, the text, by itself, is imprecise and not plainly comprehensible on either view. Pp. 665–669.

(b) Taken as a whole, the structure of the 1984 Act that established § 271(e)(1) supports Medtronic's interpretation. The 1984 Act was designed to remedy two unintended distortions of the standard 17-year patent term produced by the requirement that certain products receive premarket regulatory approval: (1) the patentee would as a practical matter not be able to reap any financial rewards during the early years of the term while he was engaged in seeking approval; and (2) the end of

the term would be effectively extended until approval was obtained for competing inventions, since competitors could not initiate the regulatory process until the term's expiration. Section 202 of the Act addressed the latter distortion by creating § 271(e)(1), while § 201 of the Act sought to eliminate the former distortion by creating 35 U. S. C. § 156, which sets forth a patent-term extension for inventions subject to a lengthy regulatory approval process. Eli Lilly's interpretation of § 271(e)(1) would allow the patentee of a medical device or other FDCA-regulated nondrug product to obtain the advantage of § 201's patent-term extension without suffering the disadvantage of § 202's noninfringement provision. It is implausible that Congress, being demonstrably aware of the *dual* distorting effects of regulatory approval requirements, should choose to address both distortions only for drug products, and for other products named in § 201 should enact provisions which not only leave in place an anticompetitive restriction at the end of the monopoly term but simultaneously expand the term itself, thereby not only failing to eliminate but positively aggravating distortion of the 17-year patent protection. Moreover, the fact that § 202 expressly excepts from its infringement exemption "a new animal drug or veterinary biological product"—each of which is subject to premarketing licensing and approval under, respectively, the FDCA and another "Federal law which regulates the manufacture, use, or sale of drugs," and neither of which was included in § 201's patent-term extension provision—indicates that §§ 201 and 202 are meant generally to be complementary. Interpreting § 271(e)(1) as the Court of Appeals did appears to create a perfect "product" fit between the two sections. Pp. 669–674.

(c) Sections 271(e)(2) and 271(e)(4), which establish and provide remedies for a certain type of patent infringement only with respect to drug products, do not suggest that § 271(e)(1) applies only to drug products as well. The former sections have a technical purpose relating to the new abbreviated regulatory approval procedures established by the 1984 Act, which happened to apply only to drug products. Pp. 675–678.

872 F. 2d 402, affirmed and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which WHITE, J., joined, *post*, p. 679. O'CONNOR, J., took no part in the consideration or decision of the case.

Timothy J. Malloy argued the cause for petitioner. With him on the briefs were *Gregory J. Vogler*, *Lawrence M. Jarvis*, and *Edward P. Gray*.

Arthur R. Miller argued the cause for respondent. With him on the brief were *Ronald E. Lund, John F. Lynch,* and *W. Bryan Farney.**

JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether 35 U. S. C. § 271(e)(1) (1982 ed., Supp II) renders activities that would otherwise constitute patent infringement noninfringing if they are undertaken for the purpose of developing and submitting to the Food and Drug Administration (FDA) information necessary to obtain marketing approval for a medical

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*Briefs of *amici curiae* urging reversal were filed for the Industrial Biotechnology Association by *Stephan E. Lawton;* for Intellectual Property Owners, Inc., by *Donald W. Banner* and *Herbert C. Wamsley;* for Neuromedical Technologies, Inc., by *John R. Feather;* for Procter & Gamble Co. by *Ronald L. Hemingway* and *Richard C. Witte;* and for Zimmer, Inc., by *Donald O. Beers, Barbara J. Delaney, Timothy Wendt,* and *Paul David Schoenle.*

Briefs of *amici curiae* urging affirmance were filed for the Commonwealth of Pennsylvania et al. by the Attorneys General for their respective States as follows: *Ernest D. Preate, Jr.,* of Pennsylvania, *Mary Sue Terry* of Virginia, *Don Siegelman* of Alabama, *John Steven Clark* of Arkansas, *Charles M. Oberly III* of Delaware, *Warren Price III* of Hawaii, *Neil F. Hartigan* of Illinois, *William J. Guste, Jr.,* of Louisiana, *Frank J. Kelley* of Michigan, *Brian McKay* of Nevada, *Lacy H. Thornburg* of North Carolina, *James E. O'Neil* of Rhode Island, *T. Travis Medlock* of South Carolina, *Roger A. Tellinghuisen* of South Dakota, *R. Paul Van Dam* of Utah, *Jeffrey L. Amestoy* of Vermont, *Kenneth O. Eikenberry* of Washington, *Roger W. Tompkins II* of West Virginia, and *Hubert H. Humphrey III* of Minnesota; for the American Association of Retired Persons by *Jamie S. Gorelick* and *Jonathan B. Sallet;* for Carbon Implants Inc. by *Michael M. Phillips;* for Cook Group Inc. by *Charles R. Reeves;* for Intermedics, Inc., by *John R. Merkling;* for Teletronics, Inc., by *Michael I. Rackman* and *William C. Nealon;* for the University of Minnesota et al. by *William P. Donahue;* for Ventritex, Inc., by *George H. Gerstman;* and for Dr. Gust H. Bardy by *David L. Garrison.*

Briefs of *amici curiae* were filed for Paralyzed Veterans of America by *Charles L. Gholz, Jeffrey H. Kaufman,* and *Robert L. Nelson;* for Pfizer Hospital Products Group, Inc., by *Rudolf E. Hutz;* and for Dr. Denton Cooley by *Margaret E. Anderson.*

device under § 515 of the Federal Food, Drug, and Cosmetic Act (FDCA), 90 Stat. 552, 21 U. S. C. § 360e.

I

In 1983, pursuant to 28 U. S. C. § 1338(a), the predecessor-in-interest of petitioner Eli Lilly & Co. filed an action against respondent Medtronic, Inc., in the United States District Court for the Eastern District of Pennsylvania to enjoin respondent's testing and marketing of an implantable cardiac defibrillator, a medical device used in the treatment of heart patients. Petitioner claimed that respondent's actions infringed its exclusive rights under United States Patent No. Re 27,757 and United States Patent No. 3,942,536. Respondent sought to defend against the suit on the ground that its activities were "reasonably related to the development and submission of information under" the FDCA, and thus exempt from a finding of infringement under 35 U. S. C. § 271(e)(1) (1982 ed., Supp. II). The District Court rejected this argument, concluding that the exemption does not apply to the development and submission of information relating to medical devices. Following a jury trial, the jury returned a verdict for petitioner on infringement of the first patent, and the court directed a verdict for petitioner on infringement of the second patent. The court entered judgment for petitioner and issued a permanent injunction against infringement of both patents.

On appeal, the Court of Appeals for the Federal Circuit reversed, holding that by virtue of § 271(e)(1) respondent's activities could not constitute infringement if they had been undertaken to develop information reasonably related to the development and submission of information necessary to obtain regulatory approval under the FDCA. It remanded for the District Court to determine whether in fact that condition had been met. 872 F. 2d 402 (1989). We granted certiorari. 493 U. S. 889 (1989).

II

In 1984, Congress enacted the Drug Price Competition and Patent Term Restoration Act of 1984 (1984 Act), 98 Stat. 1585, which amended the FDCA and the patent laws in several important respects. The issue in this case concerns the proper interpretation of a portion of § 202 of the 1984 Act, codified at 35 U. S. C. § 271(e)(1). That paragraph, as originally enacted, provided:

> "It shall not be an act of infringement to make, use, or sell a patented invention (other than a new animal drug or veterinary biological product (as those terms are used in the Federal Food, Drug, and Cosmetic Act and the Act of March 4, 1913)) solely for uses reasonably related to the development and submission of information under a Federal law which regulates the manufacture, use, or sale of drugs." 35 U. S. C. § 271(e)(1) (1982 ed., Supp. II).[1]

The parties dispute whether this provision exempts from infringement the use of patented inventions to develop and submit information for marketing approval of medical devices under the FDCA.

A

The phrase "patented invention" in § 271(e)(1) is defined to include all inventions, not drug-related inventions alone. See 35 U. S. C. § 100(a) ("When used in this title unless the context otherwise indicates . . . [t]he term 'invention' means invention or discovery"). The core of the present controversy is that petitioner interprets the statutory phrase, "a Federal law which regulates the manufacture, use, or sale of drugs," to refer only to those individual provisions of federal law that regulate drugs, whereas respondent interprets it to refer to the entirety of any Act (including, of course, the

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[1] Unless otherwise specified, references to sections of the United States Code are to those sections as they existed upon the effective date of the 1984 Act.

FDCA) at least some of whose provisions regulate drugs. If petitioner is correct, only such provisions of the FDCA as § 505, 52 Stat. 1052, as amended, 21 U. S. C. § 355, governing premarket approval of new drugs, are covered by § 271 (e)(1), and respondent's submission of information under 21 U. S. C. § 360e, governing premarket approval of medical devices, would not be a noninfringing use.

On the basis of the words alone, respondent's interpretation seems preferable. The phrase "a Federal law" can be used to refer to an isolated statutory section—one might say, for example, that the judicial review provision of the Administrative Procedure Act, 5 U. S. C. § 706, is "a Federal law." The phrase is also used, however, to refer to an entire Act. The Constitution, for example, provides that "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become *a law*, be presented to the President of the United States." U. S. Const., Art. I, § 7, cl. 2 (emphasis added). And the United States Code provides that "[w]henever a bill . . . becomes *a law* or takes effect, it shall forthwith be received by the Archivist of the United States from the President." 1 U. S. C. § 106a (emphasis added). This latter usage, which is probably the more common one, seems also the more natural in the present context. If § 271(e)(1) referred to "a Federal law which *pertains to* the manufacture, use, or sale of drugs" it might be more reasonable to think that an individual provision was referred to. But the phrase "a Federal law which *regulates* the manufacture, use, or sale of drugs" more naturally summons up the image of an entire statutory scheme of regulation. The portion of § 271(e)(1) that immediately precedes the words "a Federal law" likewise seems more compatible with reference to an entire Act. It refers to "the development and submission of information *under* a Federal law" (emphasis added). It would be more common, if a single section rather than an entire scheme were referred to, to speak

of "the development and submission of information *pursuant to* a Federal law," or perhaps "*in compliance with* a Federal law." Taking the action "under a Federal law" suggests taking it in furtherance of or compliance with a comprehensive scheme of regulation. Finally, and perhaps most persuasively, the fact that § 202 of the 1984 Act (which established § 271(e)(1)) used the word "law" in its broader sense is strongly suggested by the fact that the immediately preceding—and, as we shall see, closely related—section of the 1984 Act, when it meant to refer to a particular provision of law rather than an entire Act, referred to "the first permitted commercial marketing or use of the product under *the provision of* law." § 201, 98 Stat. 1598, 35 U. S. C. § 156(a)(5)(A) (emphasis added).

The centrally important distinction in this legislation (from the standpoint of the commercial interests affected) is not between applications for drug approval and applications for device approval, but between patents relating to drugs and patents relating to devices. If only the former patents were meant to be included, there were available such infinitely more clear and simple ways of expressing that intent that it is hard to believe the convoluted manner petitioner suggests was employed would have been selected. The provision might have read, for example, "It shall not be an act of infringement to make, use, or sell a patented drug invention . . . solely for uses reasonably related to the development and submission of information required, as a condition of manufacture, use, or sale, by Federal law." Petitioner contends that the terms "patented drug," or "drug invention" (or, presumably, "patented drug invention") would have been "potentially unclear" as to whether they covered only patents for drug products, or patents for drug composition and drug use as well. Brief for Petitioner 22. If that had been the concern, however, surely it would have been clearer and more natural to expand the phrase constituting the object of the sentence to "patented invention for drug product, drug

composition, or drug use" than to bring in such a limitation indirectly by merely limiting the laws under which the information is submitted to drug regulation laws.

On the other side of the ledger, however, one must admit that while the provision more naturally means what respondent suggests, it is somewhat difficult to understand why anyone would *want* it to mean that. Why should the touchstone of noninfringement be whether the use is related to the development and submission of information under a provision that happens to be included within an Act that, *in any of its provisions*, not necessarily the one at issue, regulates drugs? The first response is that this was a shorthand reference to the pertinent provisions Congress was aware of, all of which happened to be included in Acts that regulated drugs. But since it is conceded that all those pertinent provisions were contained within only two Acts (the FDCA and the Public Health Service Act (PHS Act), 58 Stat. 682, as amended, 42 U. S. C. §201 *et seq.*), that is not much of a time-saving shorthand. The only rejoinder can be that Congress anticipated future regulatory-submission requirements that it would want to be covered, which might not be included in the FDCA or the PHS Act but would surely (or probably) be included in another law that regulates drugs. That is not terribly convincing. On the other hand, this same awkwardness, in miniature, also inheres in petitioner's interpretation, unless one gives "under a Federal law" a meaning it simply will not bear. That is to say, if one interprets the phrase to refer to only a single *section* or even *subsection* of federal law, it is hard to understand why the fact that that section or subsection happens to regulate drugs should bring within §271(e)(1) other products that it also regulates; and it does not seem within the range of permissible meaning to interpret "a Federal law" to mean only isolated portions of a single section or subsection. The answer to this, presumably, is that Congress would not expect two products to be dealt with

in the same section or subsection—but that also is not terribly convincing.

As far as the text is concerned, therefore, we conclude that we have before us a provision that somewhat more naturally reads as the Court of Appeals determined, but that is not plainly comprehensible on anyone's view. Both parties seek to enlist legislative history in support of their interpretation, but that sheds no clear light.[2] We think the Court of Appeals' interpretation is confirmed, however, by the structure of the 1984 Act taken as a whole.

B

Under federal law, a patent "grant[s] to the patentee, his heirs or assigns, for the term of seventeen years, . . . the right to exclude others from making, using, or selling the invention throughout the United States." 35 U. S. C. § 154. Except as otherwise provided, "whoever without authority makes, uses or sells any patented invention, within the United States during the term of the patent therefor, infringes the patent." § 271(a). The parties agree that the 1984 Act was designed to respond to two unintended distortions of the 17-year patent term produced by the requirement that certain products must receive premarket regulatory approval. First, the holder of a patent relating to such products would as a practical matter not be able to reap any financial rewards during the early years of the term. When an inventor makes a potentially useful discovery, he ordinarily protects it by applying for a patent at once. Thus, if the discovery relates to a product that cannot be marketed without substantial testing and regulatory approval, the "clock" on

[2] Petitioner's principal argument is that the legislative history of § 202 mentions only drugs—which is quite different, of course, from its saying (as it does not) that only drugs are included. "It is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history . . . ." *Pittston Coal Group* v. *Sebben*, 488 U. S. 105, 115 (1988). As respondent notes, even the legislative history of § 201—whose text explicitly includes devices—contains only scant references to devices.

his patent term will be running even though he is not yet able to derive any profit from the invention.

The second distortion occurred at the other end of the patent term. In 1984, the Court of Appeals for the Federal Circuit decided that the manufacture, use, or sale of a patented invention during the term of the patent constituted an act of infringement, see § 271(a), even if it was for the sole purpose of conducting tests and developing information necessary to apply for regulatory approval. See *Roche Products, Inc.* v. *Bolar Pharmaceutical Co.*, 733 F. 2d 858, cert. denied, 469 U. S. 856 (1984).[3] Since that activity could not be commenced by those who planned to compete with the patentee until expiration of the entire patent term, the patentee's *de facto* monopoly would continue for an often substantial period until regulatory approval was obtained. In other words, the combined effect of the patent law and the premarket regulatory approval requirement was to create an effective extension of the patent term.

The 1984 Act sought to eliminate this distortion from both ends of the patent period. Section 201 of the Act established a patent-term extension for patents relating to certain products that were subject to lengthy regulatory delays and could not be marketed prior to regulatory approval. The eligible products were described as follows:

> "(1) The term 'product' means:
> "(A) A human drug product.

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[3] Petitioner suggests that it was "the 1984 *Roche* decision which prompted enactment of [§ 202]," Brief for Petitioner 20, n. 13, which should therefore be regarded as quite independent of the simultaneously enacted patent-term extension of § 201. Undoubtedly the decision in *Roche* prompted the *proposal* of § 202; but whether that alone accounted for its *enactment* is quite a different question. It seems probable that Congress—for the reasons we discuss in text—would have regarded § 201 and § 202 as related parts of a single legislative package, as we do.

"(B) Any medical device, food additive, or color additive subject to regulation under the Federal Food, Drug, and Cosmetic Act.

"(2) The term 'human drug product' means the active ingredient of a new drug, antibiotic drug, or human biological product (as those terms are used in the Federal Food, Drug, and Cosmetic Act and the Public Health Service Act) including any salt or ester of the active ingredient, as a single entity or in combination with another active ingredient." 35 U. S. C. § 156(f).

Section 201 provides that patents relating to these products can be extended up to five years if, *inter alia*, the product was "subject to a regulatory review period before its commercial marketing or use," and "the permission for the commercial marketing or use of the product after such regulatory review period [was] the first permitted commercial marketing or use of the product under the provision of law under which such regulatory review period occurred." 35 U. S. C. § 156(a).

The distortion at the other end of the patent period was addressed by § 202 of the Act. That added to the provision prohibiting patent infringement, 35 U. S. C. § 271, the paragraph at issue here, establishing that "[i]t shall not be an act of infringement to make, use, or sell a patented invention . . . solely for uses reasonably related to the development and submission of information under a Federal law which regulates the manufacture, use, or sale of drugs." § 271(e)(1). This allows competitors, prior to the expiration of a patent, to engage in otherwise infringing activities necessary to obtain regulatory approval.

Under respondent's interpretation, there may be some relatively rare situations in which a patentee will obtain the advantage of the § 201 extension but not suffer the disadvantage of the § 202 noninfringement provision, and others in

which he will suffer the disadvantage without the benefit.[4] Under petitioner's interpretation, however, that sort of disequilibrium becomes the general rule for patents relating to all products (other than drugs) named in § 201 and subject to premarket approval under the FDCA. Not only medical devices, but also food additives and color additives, since they are specifically named in § 201, see 35 U. S. C. § 156(f), receive the patent-term extension; but since the specific provisions requiring regulatory approval for them, though included in the FDCA, are not provisions requiring regulatory approval for drugs, they are (on petitioner's view) not subject to the noninfringement provision of § 271(e)(1). It seems most implausible to us that Congress, being demonstrably aware of the *dual* distorting effects of regulatory approval requirements in this entire area—dual distorting effects that were roughly offsetting, the disadvantage at the beginning of the term producing a more or less corresponding advantage at the end of the term—should choose to address both those distortions only for drug products; and for other products named in § 201 should enact provisions which not only leave in place an anticompetitive restriction at the end of the monopoly term but simultaneously expand the monopoly term itself, thereby not only failing to eliminate but positively ag-

[4] We cannot readily imagine such situations (and petitioner has not described any), except where there is good enough reason for the difference. Petitioner states that disequilibrium of this sort will often occur because the § 271(e)(1) noninfringement provision applies "whether the patent term is extended or not," and even with respect to "patents which cannot qualify for a term extension." Reply Brief for Petitioner 11. But if the patent term is not extended only because the patentee does not apply, he surely has no cause for complaint. And the major reason relevant patents will not qualify for the term extension is that they pertain to "follow-on" drug products rather than "pioneer" drug products, see §§ 156(a)(5)(A), 156 (f)(2); *Fisons plc* v. *Quigg*, 876 F. 2d 99 (CA Fed. 1989). For these, however, the abbreviated regulatory approval procedures established by Title I of the 1984 Act, 98 Stat. 1585, see 21 U. S. C. §§ 355(b)(2), (j), eliminate substantial regulatory delay at the outset of the patent term and thus eliminate the justification for the § 156 extension.

gravating distortion of the 17-year patent protection. It would take strong evidence to persuade us that this is what Congress wrought, and there is no such evidence here.[5]

Apart from the reason of the matter, there are textual indications that §§ 201 and 202 are meant generally to be complementary. That explains, for example, § 202's exception for "a new animal drug or veterinary biological product (as those terms are used in the Federal Food, Drug, and Cosmetic Act and the Act of March 4, 1913)." 35 U. S. C. § 271(e)(1). Although new animal drugs and veterinary biological products are subject to premarket regulatory licensing and approval under the FDCA, see 21 U. S. C. § 360b (new animal drugs), and the Act of March 4, 1913, see 21 U. S. C. §§ 151, 154 (veterinary biological products)—each "a Federal law which regulates the manufacture, use, or sale of drugs"—neither product was included in the patent-term extension provision of § 201. They therefore were excepted from § 202 as well. Interpreting § 271(e)(1) as the Court of Appeals did

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[5] Petitioner argues that there was good reason for Congress to establish an infringement exemption with respect to drugs but not devices, since testing of the latter does much greater economic harm to the patentee. Devices, petitioner contends, are much more expensive than drugs ($17,000 apiece for respondent's allegedly infringing defibrillators); and many have only a small number of potential customers, who will purchase only a single device each, so that depleting the market through testing may do substantial harm. Brief for Petitioner 30–31. These concerns, however, apply with respect to certain drugs as well. According to one source, a year's dosage of Cyclosporine (used to suppress rejection of new organs) costs from $5,000 to $7,000; of AZT (used to treat AIDS) $8,000; of Monoclate (used to speed blood clotting in hemophiliacs) $25,000; and of Growth Hormone (used to treat dwarfism) $8,000 to $30,000. A. Pollack, The Troubling Cost of Drugs That Offer Hope, N. Y. Times, Feb. 9, 1988, p. A1, col. 3. Another new drug, Tissue Plasminogen Activator, used in the treatment of heart attacks to dissolve blood clots, costs $2,200 per dose and is prescribed for only a single dose. *Ibid.* Moreover, even if the factors petitioner mentions could explain the omission from § 271(e)(1) of medical devices, they could not explain the omission of food additives and color additives.

here appears to create a perfect "product" fit between the two sections. All of the products eligible for a patent term extension under § 201 are subject to § 202, since all of them—medical devices, food additives, color additives, new drugs, antibiotic drugs, and human biological products—are subject to premarket approval under various provisions of the FDCA, see 21 U. S. C. § 360e (medical devices); § 348 (food additives); § 376 (color additives); § 355 (new drugs); § 357 (antibiotic drugs), or under the PHS Act, see 42 U. S. C. § 262 (human biological products). And the products subject to premarket approval under the FDCA and the Act of March 4, 1913, that are *not* made eligible for a patent term extension under § 201—new animal drugs and veterinary biological products—are excluded from § 202 as well.[6]

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[6] It is true that § 202, if interpreted to apply to all products regulated by the FDCA and other drug-regulating statutes, has a product coverage that includes other products, in addition to new animal drugs and veterinary biological products, not numbered among the specifically named products in § 201—for example, food, infant formulas, cosmetics, pesticides, and vitamins. But for the § 202 exemption to be applicable, the patent use must be "reasonably related to the development and submission of information under" the relevant law. New animal drugs and veterinary biological products appear to be the only additional products covered by drug-regulating statutes for which the requirement of premarket approval—and hence the need for "development and submission of information"—existed. With respect to food, infant formulas, cosmetics, and pesticides, for example, the FDCA merely established generally applicable standards that had to be met. See, *e. g.*, 21 U. S. C. § 341 (food); § 350a (infant formula); § 361 (cosmetics); § 346a (pesticides); cf. § 350 (vitamins).

It must be acknowledged that the seemingly complete product correlation between § 201 and § 202 was destroyed in 1986, when, without adding "new infant formula" to the defined products eligible for the patent-term extension under § 156, Congress established a premarket approval requirement for that product, and thus automatically rendered it eligible for the § 271(e)(1) exemption from patent infringement. See Pub. L. 99–570, § 4014(a)(7), 100 Stat. 3207–116, codified at 21 U. S. C. § 350a(d). That subsequent enactment does not change our view of what the statute means. That isolated indication of lack of correlation between § 156 and § 271(e)(1) is in any event contradicted by the 1988 amendment that added

III

According to petitioner, "[t]he argument for a broad construction of Section 271(e)(1) is refuted by the companion Sections (e)(2) and (e)(4)." Brief for Petitioner 17. The latter provide:

> "(2) It shall be an act of infringement to submit an application under section 505(j) of the Federal Food, Drug, and Cosmetic Act or described in section 505(b)(2) of such Act for a drug claimed in a patent or the use of which is claimed in a patent, if the purpose of such submission is to obtain approval under such Act to engage in the commercial manufacture, use, or sale of a drug claimed in a patent or the use of which is claimed in a patent before the expiration of such patent.
>
> . . . . . .
>
> "(4) For an act of infringement described in paragraph (2)—
>
> "(A) the court shall order the effective date of any approval of the drug involved in the infringement to be a date which is not earlier than the date of the expiration of the patent which has been infringed,
>
> "(B) injunctive relief may be granted against an infringer to prevent the commercial manufacture, use, or sale of an approved drug, and
>
> "(C) damages or other monetary relief may be awarded against an infringer only if there has been commercial manufacture, use, or sale of an approved drug.
>
> "The remedies prescribed by subparagraphs (A), (B), and (C) are the only remedies which may be granted by a court for an act of infringement described in paragraph

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most new animal drugs and veterinary biological products to § 156 and simultaneously deleted from § 271(e)(1) the infringement exception for those products. See Generic Animal Drug and Patent Term Restoration Act, 102 Stat. 3971, 3984–3989.

(2), except that a court may award attorney fees under section 285." 35 U. S. C. §§ 271(e)(2), (4).

Petitioner points out that the protections afforded by these provisions are conferred exclusively on the holders of drug patents. They would, petitioner contends, have been conferred upon the holders of other patents if Congress had intended the infringement exemption of § 271(e)(1) to apply to them as well.

That is not so. The function of the paragraphs in question is to define a new (and somewhat artificial) act of infringement for a very limited and technical purpose that relates only to certain drug applications. As an additional means of eliminating the *de facto* extension at the end of the patent term in the case of drugs, and to enable new drugs to be marketed more cheaply and quickly, § 101 of the 1984 Act amended § 505 of the FDCA, 21 U. S. C. § 355, to authorize abbreviated new drug applications (ANDA's), which would substantially shorten the time and effort needed to obtain marketing approval. An ANDA may be filed for a generic drug that is the same as a so-called "pioneer drug" previously approved, see § 355(j)(2)(A), or that differs from the pioneer drug in specified ways, see § 355(j)(2)(C). The ANDA applicant can substitute bioequivalence data for the extensive animal and human studies of safety and effectiveness that must accompany a full new drug application. Compare § 355(j)(2)(A)(iv) with § 355(b)(1). In addition, § 103 of the 1984 Act amended § 505(b) of the FDCA, § 355(b), to permit submission of a so-called paper new drug application (paper NDA), an application that relies on published literature to satisfy the requirement of animal and human studies demonstrating safety and effectiveness. See § 355(b)(2). Like ANDA's, paper NDA's permit an applicant seeking approval of a generic drug to avoid the costly and time-consuming studies required for a pioneer drug.

These abbreviated drug-application provisions incorporated an important new mechanism designed to guard against

infringement of patents relating to pioneer drugs. Pioneer drug applicants are required to file with the FDA the number and expiration date of any patent which claims the drug that is the subject of the application, or a method of using such drug. See § 355(b)(1). ANDA's and paper NDA's are required to contain one of four certifications with respect to each patent named in the pioneer drug application: (1) "that such patent information has not been filed," (2) "that such patent has expired," (3) "the date on which such patent will expire," or (4) "that such patent is invalid or will not be infringed by the manufacture, use, or sale of the new drug for which the application is submitted." §§ 355(b)(2)(A), 355(j)(2)(A)(vii).

This certification is significant, in that it determines the date on which approval of an ANDA or paper NDA can be made effective, and hence the date on which commercial marketing may commence. If the applicant makes either the first or second certification, approval can be made effective immediately. See §§ 355(c)(3)(A), 355(j)(4)(B)(i). If the applicant makes the third certification, approval of the application can be made effective as of the date the patent expires. See §§ 355(c)(3)(B), 355(j)(4)(B)(ii). If the applicant makes the fourth certification, however, the effective date must depend on the outcome of further events triggered by the Act. An applicant who makes the fourth certification is required to give notice to the holder of the patent alleged to be invalid or not infringed, stating that an application has been filed seeking approval to engage in the commercial manufacture, use, or sale of the drug before the expiration of the patent, and setting forth a detailed statement of the factual and legal basis for the applicant's opinion that the patent is not valid or will not be infringed. See §§ 355(b)(3)(B), 355(j)(2)(B)(ii). Approval of an ANDA or paper NDA containing the fourth certification may become effective immediately only if the patent owner has not initiated a lawsuit for infringement within 45 days of receiving notice of the certification. If the

owner brings such a suit, then approval may not be made effective until the court rules that the patent is not infringed or until the expiration of (in general) 30 months, whichever first occurs. See §§ 355(c)(3)(C), 355(j)(4)(B)(iii).

This scheme will not work, of course, if the holder of the patent pertaining to the pioneer drug is disabled from establishing in court that there has been an act of infringement. And that was precisely the disability that the new 35 U. S. C. § 271(e)(1) imposed with regard to use of his patented invention only for the purpose of obtaining premarketing approval. Thus, an act of infringement had to be created for these ANDA and paper NDA proceedings. That is what is achieved by § 271(e)(2)—the creation of a highly artificial act of infringement that consists of submitting an ANDA or a paper NDA containing the fourth type of certification that is in error as to whether commercial manufacture, use, or sale of the new drug (none of which, of course, has actually occurred) violates the relevant patent. Not only is the defined act of infringement artificial, so are the specified consequences, as set forth in subsection (e)(4). Monetary damages are permitted only if there has been "commercial manufacture, use, or sale." § 271(e)(4)(C). Quite obviously, the purpose of subsections (e)(2) and (e)(4) is to enable the judicial adjudication upon which the ANDA and paper NDA schemes depend. It is wholly to be expected, therefore, that these provisions would apply *only* to applications under the sections establishing those schemes—which (entirely incidentally, for present purposes) happen to be sections that relate only to drugs and not to other products.[7]

[7] Although petitioner has not challenged § 271(e)(1) on constitutional grounds, it argues that we should adopt its construction because of the "serious constitutional question under the takings clause of the Fifth Amendment . . . [that would arise] if the statute is interpreted to authorize the infringing use of medical devices." Brief for Petitioner 31. We do not see how this consideration makes any difference. Even if the competitive injury caused by the noninfringement provision is *de minimis* with respect to most drugs, surely it is substantial with respect to some of them—so the

* * *

No interpretation we have been able to imagine can transform § 271(e)(1) into an elegant piece of statutory draftsmanship. To construe it as the Court of Appeals decided, one must posit a good deal of legislative imprecision; but to construe it as petitioner would, one must posit that and an implausible substantive intent as well.

The judgment of the Court of Appeals is affirmed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

JUSTICE O'CONNOR took no part in the consideration or decision of this case.

JUSTICE KENNEDY, with whom JUSTICE WHITE joins, dissenting.

Petitioner contends that respondent infringed its patents by testing and marketing a medical device known as a cardiac defibrillator. The Court holds that 35 U. S. C. § 271(e)(1) (1982 ed., Supp. II), a provision of the patent law, may give respondent a defense to this charge. It rules, in particular, that § 271(e)(1) will excuse respondent if it acted for the sole purpose of developing information necessary to obtain marketing approval for the device under § 515 of the Federal Food, Drug, and Cosmetic Act (FDCA), 90 Stat. 552, 21 U. S. C. § 360e. I dissent because I find the Court's decision contrary to the most plausible reading of the statutory language.

The applicable version of § 271(e)(1) states:

> "It shall not be an act of infringement to make, use, or sell a patented invention (other than a new animal drug or veterinary biological product (as those terms are used in the Federal Food, Drug, and Cosmetic Act and the Act of March 4, 1913)) solely for uses reasonably related

"serious constitutional question" (if it is that) is not avoided by petitioner's construction either.

> to the development and submission of information under a Federal law which regulates the manufacture, use, or sale of drugs." 35 U. S. C. § 271(e)(1) (1982 ed., Supp. II).

The Court says that Congress used the phrase "a Federal law which regulates the manufacture, use, or sale of drugs" to refer to the entirety of any Act, at least some portion of which regulates drugs. The FDCA fits this description. As a result, even though respondent sought marketing approval under the FDCA for a medical device instead of a drug, the Court concludes that § 271(e)(1) may serve as a defense to patent infringement. I disagree.

Section 271(e)(1), in my view, does not privilege the testing of medical devices such as the cardiac defibrillator. When § 271(e)(1) speaks of a law which regulates drugs, I think that it does not refer to particular enactments or implicate the regulation of anything other than drugs. It addresses the legal regulation of drugs as opposed to other products. Thus, while the section would permit a manufacturer to use a drug for the purpose of obtaining marketing approval under the FDCA, it does not authorize a manufacturer to use or sell other products that, by coincidence, the FDCA also happens to regulate. Respondent, in consequence, has no defense under § 271(e)(1).

The Court asserts that Congress could have specified this result in a clearer manner. See *ante*, at 667–668. That is all too true. But we do not tell Congress how to express its intent. Instead, we discern its intent by assuming that Congress employs words and phrases in accordance with their ordinary usage. In this case, even if Congress could have clarified § 271(e)(1), the Court ascribes a most unusual meaning to the existing language. Numerous statutory provisions and court decisions, from a variety of jurisdictions, use words almost identical to those of § 271(e)(1), and they never mean what the Court says they mean here.

For instance, in delineating the scope of pre-emption by the Employee Retirement Income Security Act of 1974 (ERISA), Congress stated that "nothing in this title shall be construed to exempt or relieve any person from *any law of any State which regulates insurance, banking, or securities.*" 88 Stat. 897, 29 U. S. C. § 1144(b)(2)(A) (emphasis added). Interpreting this language as the Court interprets § 271(e)(1) would imply that Congress intended to give the States a free hand to enact any law that conflicts with ERISA so long as some portion of the state enactment regulates insurance, banking, or securities. No one would contend for this result. The Texas Legislature, in a like manner, has said that "a person shall pay $1 as a court cost on conviction of any criminal offense . . . except that a conviction arising under *any law that regulates pedestrians or the parking of motor vehicles* is not included." Tex. Govt. Code Ann. § 56.001(b) (Supp. 1990) (emphasis added). I do not think that Texas intended by this language to exclude all convictions that might arise under an Act, such as a traffic code, that regulates speeding in addition to pedestrians and parking. And, when the Missouri Legislature specified that "[n]o governmental subdivision or agency may enact or enforce *a law that regulates or makes any conduct in the area [of gambling] an offense*," Mo. Rev. Stat. § 572.100 (1986) (emphasis added), I doubt that it meant to invalidate local enactments in their entirety whenever some portion of them regulates gambling. Countless other examples confound the Court's method of reading the operative language in this case. See, *e. g.*, N. C. Gen. Stat. § 42–37.1 (1984) (prohibiting retaliatory eviction by landlords for complaints about violations of any *"[s]tate or federal law that regulates premises used for dwelling purposes"*) (emphasis added); *Cochran* v. *Peeler*, 209 Miss. 394, 408, 47 So. 2d 806, 809 (1950) ("[T]he violation of *a law which regulates human conduct in the operation of vehicles on the roads* becomes, by legislative fiat, negligence") (emphasis added); *Local 456 Int'l Brotherhood of Teamsters* v. *Cort-*

landt, 68 Misc. 2d 645, 653, 327 N. Y. S. 2d 143, 153 (1971) ("[U]nder the home rule power to enact local laws, a town may enact *a law which regulates the powers, duties, qualifications, [etc.] of its officers and employees*") (emphasis added); see also U. S. Const., Amdt. 14, § 1 ("No State shall make or enforce *any law which shall abridge the privileges or immunities of citizens of the United States*") (emphasis added). Unless we assume that these examples do not reflect ordinary usage, which I see no basis for doing, we cannot hold that § 271(e)(1) refers to the entirety of the FDCA or any other Act which regulates drugs. Instead, I would conclude, the section refers only to the actual regulation of drugs and does not exempt the testing of a medical device from patent infringement.

Congress did not act in an irrational manner when it drew a distinction between drugs and medical devices. True, like medical devices, some drugs have a very high cost. See *ante*, at 673, n. 5. Testing a patented medical device, however, often will have greater effects on the patent holder's rights than comparable testing of a patented drug. As petitioner has asserted, manufacturers may test generic versions of patented drugs, but not devices, under abbreviated procedures. See 21 U. S. C. § 355(j). These procedures, in general, do not affect the market in a substantial manner because manufacturers may test the drugs on a small number of subjects, who may include healthy persons who otherwise would not buy the drug. See § 355(j)(7)(B) (stating the requirements of a showing of the "bioequivalence" of drugs). By contrast, as in this case, manufacturers test and market medical devices in clinical trials on patients who would have purchased the device from the patent holder. See App. 39–42; see also 21 CFR § 812.7(b) (1989) (permitting manufacturers to recover their costs in clinical trials). Although the Court gives examples of high cost drug dosages, it does not demonstrate that the testing of these drugs detracts from a patent holder's sales. Congress could have determined that the dif-

ferences in testing or some other difference between drugs and devices justified excluding the latter from the ambit of §271(e)(1). See 879 F. 2d 849, 850, n. 4 (CA Fed. 1989) (Newman, J., dissenting from the denial of rehearing en banc). For these reasons, I dissent.

REPORTER'S NOTE

The next page is purposely numbered 901. The numbers between 683 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR JUNE 4 THROUGH JUNE 20, 1990

Certiorari Granted—Vacated and Remanded

No. 89–198. NATIONAL TREASURY EMPLOYEES UNION *v.* UNITED STATES NUCLEAR REGULATORY COMMISSION ET AL.; and No. 89–562. FEDERAL LABOR RELATIONS AUTHORITY *v.* NATIONAL TREASURY EMPLOYEES UNION ET AL. C. A. 4th Cir. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *Fort Stewart Schools* v. *FLRA*, 495 U. S. 641 (1990). Reported below: 879 F. 2d 1225.

No. 89–736. FEDERAL LABOR RELATIONS AUTHORITY *v.* FORT KNOX DEPENDENT SCHOOLS ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Fort Stewart Schools* v. *FLRA*, 495 U. S. 641 (1990). Reported below: 875 F. 2d 1179.

No. 89–1101. UNITED STATES *v.* CUNNINGHAM. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Taylor* v. *United States*, 495 U. S. 575 (1990). Reported below: 878 F. 2d 311.

No. 89–1177. 11126 BALTIMORE BLVD., INC., T/A WARWICK BOOKS *v.* PRINCE GEORGE'S COUNTY, MARYLAND. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *FW/PBS, Inc.* v. *Dallas*, 493 U. S. 215 (1990). Reported below: 886 F. 2d 1415.

No. 89–5743. PAYTON *v.* UNITED STATES. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Taylor* v. *United States*, 495 U. S. 575 (1990). Reported below: 878 F. 2d 1089.

No. 89–5938. GARCIA *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Taylor* v. *United States*, 495 U. S. 575 (1990). Reported below: 885 F. 2d 868.

No. 89–6995. JORDAN *v.* UNITED STATES. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Taylor* v. *United States*, 495 U. S. 575 (1990). Reported below: 893 F. 2d 182.

Miscellaneous Orders

No. — — ——. ALLUSTIARTE ET UX. *v.* COOPER; and
No. — — ——. BOYLE ET AL. *v.* ROGERS DISTRIBUTING CORP. ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. A–720. HISHMEH *v.* NEW JERSEY DIVISION OF MOTOR VEHICLES. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. D–833. IN RE DISBARMENT OF LAIRD. Disbarment entered. [For earlier order herein, see 493 U. S. 961.]

No. D–855. IN RE DISBARMENT OF RIVAS. Disbarment entered. [For earlier order herein, see 493 U. S. 1053.]

No. D–874. IN RE DISBARMENT OF PEIPER. Disbarment entered. [For earlier order herein, see 494 U. S. 1015.]

No. D–892. IN RE DISBARMENT OF SHORTER. Disbarment entered. [For earlier order herein, see 494 U. S. 1076.]

No. D–897. IN RE DISBARMENT OF HERSH. Alan Mark Hersh, of Beverly Hills, Cal., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on April 23, 1990 [495 U. S. 902], is hereby discharged.

No. D–904. IN RE DISBARMENT OF ROOT. It is ordered that Thomas Lawrence Root, of Washington, D. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–905. IN RE DISBARMENT OF HANNA. It is ordered that Larry L. Hanna, of Myrtle Beach, S. C., be suspended from the practice of law in this Court and that a rule issue, returnable

within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 109, Orig. OKLAHOMA ET AL. *v.* NEW MEXICO. Motion of the Special Master for allowance of compensation and reimbursement of expenses granted, and the Special Master is awarded $61,292.54 for the period September 1, 1989, through January 31, 1990, one-third to be paid by each party. [For earlier order herein, see, *e. g.*, 493 U. S. 929.]

No. 89–532. PEAT MARWICK MAIN & CO. *v.* HOLLOWAY ET AL., 494 U. S. 1014. Motion of respondents to retax costs denied.

No. 89–839. ARIZONA *v.* FULMINANTE. Sup. Ct. Ariz. [Certiorari granted, 494 U. S. 1055.] Motion of Americans for Effective Law Enforcement, Inc., et al. for leave to file a brief as *amici curiae* granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 89–1145. MCCRACKEN *v.* CITY OF COLLEGE PARK, GEORGIA, ET AL., 494 U. S. 1028. Motion of respondents for attorney's fees denied.

No. 89–1421. POWELL ET AL. *v.* NATIONAL FOOTBALL LEAGUE ET AL. C. A. 8th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 89–7043. KUDLER *v.* JUDICIAL COUNCIL OF THE SECOND CIRCUIT. C. A. 2d Cir.; and

No. 89–7170. JENGA ET UX. *v.* DEVEAUX. Super. Ct. Ga., Fulton County. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until June 25, 1990, within which to pay the docketing fee required by Rule 38(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petitions for writs of certiorari without reaching the merits of the motions to proceed *in forma pauperis*.

No. 89–7423. IN RE SEITU; and

No. 89–7452. IN RE WILSON. Petitions for writs of habeas corpus denied.

No. 89–7008. IN RE CARSON; and
No. 89–7350. IN RE SWENTEK. Petitions for writs of mandamus denied.

No. 89–6889. IN RE MCFADDEN. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 89–1332. MCNARY, COMMISSIONER OF IMMIGRATION AND NATURALIZATION, ET AL. *v.* HAITIAN REFUGEE CENTER, INC., ET AL. C. A. 11th Cir. Certiorari granted. Reported below: 872 F. 2d 1555.

No. 89–1416. AIR COURIER CONFERENCE OF AMERICA *v.* AMERICAN POSTAL WORKERS UNION, AFL–CIO, ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 282 U. S. App. D. C. 5, 891 F. 2d 304.

No. 89–1598. EASTERN AIRLINES, INC. *v.* FLOYD ET AL. C. A. 11th Cir. Certiorari granted. Reported below: 872 F. 2d 1462.

No. 89–1452. MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC., ET AL. *v.* UNITED DISTRIBUTION COS. ET AL.; and
No. 89–1453. FEDERAL ENERGY REGULATORY COMMISSION *v.* UNITED DISTRIBUTION COS. ET AL. C. A. 5th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 885 F. 2d 209.

No. 89–7024. MCCLESKEY *v.* ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. In addition to the questions presented by the petition, the parties are requested to brief and argue the following question: "Must the State demonstrate that a claim was deliberately abandoned in an earlier petition for a writ of habeas corpus in order to establish that inclusion of that claim in a subsequent habeas petition constitutes abuse of the writ?" Reported below: 890 F. 2d 342.

Certiorari Denied

No. 88–1885. LEONARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 868 F. 2d 1393.

No. 88–7307. CARTER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 872 F. 2d 434.

No. 88–7398. SCHOENBORN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 881 F. 2d 1079.

No. 88–7509. LOPEZ QUINTERO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 872 F. 2d 107.

No. 89–1293. W. C. GARCIA & ASSOCIATES, INC. *v.* MICELI, DISTRICT DIRECTOR, INTERNAL REVENUE SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 889 F. 2d 1097.

No. 89–1295. CONNECTICUT *v.* LONERGAN. Sup. Ct. Conn. Certiorari denied. Reported below: 213 Conn. 74, 566 A. 2d 677.

No. 89–1415. LINDSEY ET AL. *v.* FERRIS FACULTY ASSN. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 893 F. 2d 111.

No. 89–1426. LAYKIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 886 F. 2d 1534.

No. 89–1444. SHRINERS HOSPITALS FOR CRIPPLED CHILDREN *v.* FIRST SECURITY BANK OF UTAH, N. A., PERSONAL REPRESENTATIVE OF THE ESTATE OF JONES, ET AL. Sup. Ct. Wyo. Certiorari denied. Reported below: 770 P. 2d 1100 and 782 P. 2d 229.

No. 89–1450. NORTHERN TELECOM, INC. *v.* TAYLOR, COMMISSIONER OF REVENUE OF TENNESSEE, ET AL. Sup. Ct. Tenn. Certiorari denied. Reported below: 781 S. W. 2d 837.

No. 89–1539. NORTH CAROLINA *v.* DAVIS. Sup. Ct. N. C. Certiorari denied. Reported below: 325 N. C. 607, 386 S. E. 2d 418.

No. 89–1542. CARIBBEAN MARINE, INC., AKA BIZCAP, INC. *v.* OLIVE, DIRECTOR OF VIRGIN ISLANDS BUREAU OF INTERNAL REVENUE, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 892 F. 2d 1163.

No. 89–1559. ESTES *v.* CITY OF MOORE, OKLAHOMA, ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–1568. CHAMBLESS ET UX. *v.* MASTERS, MATES & PILOTS PENSION PLAN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 885 F. 2d 1053.

No. 89–1576. TRAVELERS INDEMNITY CO. *v.* AVONDALE INDUSTRIES, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 887 F. 2d 1200.

No. 89–1577. HOOPER *v.* GILL ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 79 Md. App. 437, 557 A. 2d 1349.

No. 89–1578. MOORE *v.* CITY OF COSTA MESA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 886 F. 2d 260.

No. 89–1581. UNITED STATES FIDELITY & GUARANTY CO. *v.* URETA. C. A. 5th Cir. Certiorari denied. Reported below: 892 F. 2d 426.

No. 89–1586. BATES *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 553 So. 2d 135.

No. 89–1589. ALPHA WIRE CORP. ET AL. *v.* SIEGEL. C. A. 3d Cir. Certiorari denied. Reported below: 894 F. 2d 50.

No. 89–1594. LEGG *v.* NORTH CAROLINA BOARD OF LAW EXAMINERS. Sup. Ct. N. C. Certiorari denied. Reported below: 325 N. C. 658, 386 S. E. 2d 174.

No. 89–1596. SUMNER *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 553 So. 2d 145.

No. 89–1597. GENERAL ACCIDENT FIRE & LIFE ASSURANCE CORP. LTD. *v.* ITT GENERAL CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 893 F. 2d 1329.

No. 89–1601. FULLER, INDIVIDUALLY AND DBA PARTY TIME PRODUCTIONS *v.* MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH, GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 193 Ga. App. 716, 389 S. E. 2d 7.

No. 89–1610. MORI *v.* MCCRANE ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 89–1612. IRBY ET AL. *v.* VIRGINIA STATE BOARD OF ELECTIONS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 889 F. 2d 1352.

No. 89–1613. BASTIAN ET AL. *v.* PETREN RESOURCES CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 892 F. 2d 680.

No. 89–1621. McMANAMA *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 95 Ore. App. 220, 769 P. 2d 808.

No. 89–1635. NORTHWEST ADVANCEMENT, INC., ET AL. *v.* OREGON BUREAU OF LABOR ET AL. Ct. App. Ore. Certiorari denied. Reported below: 96 Ore. App. 146, 772 P. 2d 943.

No. 89–1636. MONTENEGRO *v.* ARIZONA DEPARTMENT OF ECONOMIC SECURITY ET AL. Ct. App. Ariz. Certiorari denied.

No. 89–1650. KAPLAN *v.* COUNTY OF LOS ANGELES. C. A. 9th Cir. Certiorari denied. Reported below: 894 F. 2d 1076.

No. 89–1666. J M SMITH CORP., DBA SMITH DATA PROCESSING *v.* PC I CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 892 F. 2d 74.

No. 89–1706. I-POINT AB ET AL. *v.* ZETA ASSOCIATES ET AL. C. A. D. C. Cir. Certiorari denied.

No. 89–1709. PATTERSON *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 896 F. 2d 544.

No. 89–1722. GIBSON *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 29 M. J. 379.

No. 89–1732. SANDERS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 893 F. 2d 133.

No. 89–1740. STANKO *v.* UNITED STATES PAROLE COMMISSION ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 890 F. 2d 419.

No. 89–1755. DOBARD *v.* CITY OF OAKLAND ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 883 F. 2d 1023.

No. 89–5282. DOMBROWSKI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 877 F. 2d 520.

No. 89–5807. SANDERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 884 F. 2d 574.

No. 89–5890. MERRITT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 882 F. 2d 916.

No. 89–5962. TAYLOR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 882 F. 2d 1018.

No. 89-6101. TWOMEY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 884 F. 2d 46.

No. 89-6215. FULLER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 887 F. 2d 144.

No. 89-6375. AVILA-ISCOA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 888 F. 2d 1049.

No. 89-6540. STARKS *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 89-6648. ERIKSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 89-6693. YAGER ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 892 F. 2d 80.

No. 89-6722. GALLAGHER *v.* GOLDHART ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 889 F. 2d 1087.

No. 89-6750. SILKWOOD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 893 F. 2d 245.

No. 89-6786. KEENER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 892 F. 2d 725.

No. 89-6793. BROWN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 89-6849. JONES *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 187 Ill. App. 3d 1123, 569 N. E. 2d 334.

No. 89-6896. HARRIS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 132 Ill. 2d 366, 547 N. E. 2d 1241.

No. 89-6929. MILLMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 891 F. 2d 278.

No. 89-6966. ARROYO-PLAUD *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 900 F. 2d 246.

No. 89-6971. FERENC *v.* TUGGLE ET AL. C. A. 11th Cir. Certiorari denied.

No. 89–7095. MCFADDEN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. Reported below: 894 F. 2d 1342.

No. 89–7122. FANNIEL *v.* HER MAJESTY QUEEN ELIZABETH II ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 891 F. 2d 277.

No. 89–7154. SAMUEL *v.* MORRISON INC., DBA MORRISON FOOD SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 893 F. 2d 343.

No. 89–7157. SIMPSON *v.* KENTUCKY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 869 F. 2d 1493.

No. 89–7159. BUTZIN *v.* WOOD, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 886 F. 2d 1016.

No. 89–7160. FANSLER *v.* CORRECTIONS CABINET ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 895 F. 2d 1412.

No. 89–7163. SOUTHERLAND *v.* WOFFORD ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 894 F. 2d 408.

No. 89–7164. BOYD *v.* LOUISIANA. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 548 So. 2d 1265.

No. 89–7165. SAMMONS *v.* HARRISON ET AL. C. A. 11th Cir. Certiorari denied.

No. 89–7167. AWKAKEWAKEYES *v.* SUTTON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 884 F. 2d 1382.

No. 89–7172. MARTINEZ *v.* KERBY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–7173. KELLEY *v.* INTERNATIONAL TOTAL SERVICES, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 900 F. 2d 253.

No. 89–7179. BARNES *v.* MARTINEZ, GOVERNOR OF FLORIDA, ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 558 So. 2d 17.

No. 89–7180. MINDEK *v.* PENNSYLVANIA (two cases). Super. Ct. Pa. Certiorari denied.

No. 89–7181. MIRANDA *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 897 F. 2d 539.

No. 89–7184. LAWSON *v.* WALLACE ET AL. C. A. 11th Cir. Certiorari denied.

No. 89–7186. MARSH *v.* FORD MOTOR CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 886 F. 2d 1316.

No. 89–7187. ROBINSON *v.* MEYER ET AL. Ct. App. Ohio, Stark County. Certiorari denied.

No. 89–7190. PARKER *v.* BOARD OF REVIEW ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 89–7193. COADES *v.* VAUGHN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION. C. A. 3d Cir. Certiorari denied.

No. 89–7199. BROWN *v.* SULLIVAN, SUPERINTENDENT, WOODBOURNE CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 875 F. 2d 307.

No. 89–7202. BENOIST *v.* DEPARTMENT OF DEFENSE. C. A. Fed. Cir. Certiorari denied. Reported below: 895 F. 2d 1420.

No. 89–7205. DONALD *v.* UNITED STATES DEPARTMENT OF EDUCATION. C. A. 11th Cir. Certiorari denied.

No. 89–7207. PAREZ *v.* SAN DIEGO COUNTY SOCIAL SERVICES. C. A. 9th Cir. Certiorari denied. Reported below: 894 F. 2d 409.

No. 89–7212. EVERSON *v.* OTT ET AL. Ct. App. Ga. Certiorari denied.

No. 89–7213. FORD ET AL. *v.* RUTLEDGE ET AL. C. A. 8th Cir. Certiorari denied.

No. 89–7219. BOATWRIGHT *v.* BARTON, SUPERINTENDENT, FLORIDA STATE PRISON. C. A. 11th Cir. Certiorari denied. Reported below: 896 F. 2d 557.

No. 89–7220. BROWN *v.* WAINWRIGHT ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 897 F. 2d 536.

No. 89–7237. AGUILAR *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION.

C. A. 5th Cir. Certiorari denied. Reported below: 896 F. 2d 550.

No. 89–7240. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 878 F. 2d 1439.

No. 89–7265. SCHUBERT *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 235 N. J. Super. 212, 561 A. 2d 1186.

No. 89–7267. CANTRELL *v.* KELLEY, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 896 F. 2d 545.

No. 89–7301. DEWILLIAMS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 89–7310. DUGAN *v.* WISCONSIN. Ct. App. Wis. Certiorari denied.

No. 89–7317. TELK *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–7318. YOUNG *v.* SMITH ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 896 F. 2d 543.

No. 89–7327. KINLOCH *v.* BRADY, SECRETARY OF THE TREASURY. C. A. 6th Cir. Certiorari denied. Reported below: 895 F. 2d 1413.

No. 89–7369. COVINGTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 89–7379. COLBERT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 894 F. 2d 373.

No. 89–7385. EGAN *v.* SOWDERS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 894 F. 2d 407.

No. 89–7391. PEOPLES *v.* GRAYSON, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 891 F. 2d 292.

No. 89–7396. LAFRAUGH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 893 F. 2d 314.

No. 89–7398. FOSTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 896 F. 2d 551.

No. 89–7399. ACOSTA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 896 F. 2d 550.

No. 89–7447. LEE *v.* LATOURELLE, SUPERINTENDENT, OGDENSBURG CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 898 F. 2d 137.

No. 88–1031. CITIBANK, N. A. *v.* TRINH. C. A. 6th Cir. Motion of New York Clearing House Association et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 850 F. 2d 1164.

No. 89–1170. TEXAS *v.* CHAMBERS. Ct. Crim. App. Tex. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 784 S. W. 2d 29.

No. 89–1574. GENERAL MOTORS CORP. ET AL. *v.* DEPARTMENT OF REVENUE OF ALABAMA; and

No. 89–1587. REYNOLDS METALS CO. *v.* SIZEMORE, COMMISSIONER OF REVENUE OF ALABAMA. Sup. Ct. Ala. Motions of Committee on State Taxation of the Council of State Chambers of Commerce and Tax Executives Institute, Inc., for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 558 So. 2d 373.

No. 89–1590. NEW YORK STATE DEPARTMENT OF LABOR ET AL. *v.* GENERAL ELECTRIC CO. C. A. 2d Cir. Motions of Building and Construction Trades Department, AFL–CIO, and Joint Industry Board of Electrical Industry for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 891 F. 2d 25.

No. 89–1599. LANGAN ENGINEERING ASSOCIATES, INC. *v.* 21ST PHOENIX CORP., FKA HANSON DEVELOPMENT CO. C. A. 10th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 893 F. 2d 1155.

No. 89–1664. NEW MEXICO *v.* CALLAWAY; and NEW MEXICO *v.* MOLINAR. Sup. Ct. N. M. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 109 N. M. 416, 785 P. 2d 1035 (first case); 109 N. M. 536, 787 P. 2d 455 (second case).

No. 89–6716. PIERCE *v.* TEXAS. Ct. Crim. App. Tex.; and

No. 89–7146. FREEMAN *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: No. 89–6716, 777 S. W. 2d 399; No. 89–7146, 555 So. 2d 215.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 87–6927. HAMILTON, AS NATURAL MOTHER AND NEXT FRIEND OF SMITH *v.* TEXAS, 495 U. S. 923;

No. 88–1213. EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF OREGON, ET AL. *v.* SMITH ET AL., 494 U. S. 872;

No. 88–5986. OSBORNE *v.* OHIO, 495 U. S. 103;

No. 89–1319. TARKA *v.* FRANKLIN ET AL., 494 U. S. 1080;

No. 89–1334. ROSENTHAL *v.* YOUNG ET AL., 494 U. S. 1080;

No. 89–1341. RAMIREZ *v.* TRANSAMERICAN NATURAL GAS CORP. ET AL., 494 U. S. 1081;

No. 89–1382. IN RE FREED, 494 U. S. 1077;

No. 89–5737. COLEMAN *v.* SAFFLE, WARDEN, ET AL., 494 U. S. 1090;

No. 89–6302. WILLIAMS *v.* KEMP, WARDEN, 494 U. S. 1090;

No. 89–6818. IN RE HICKS, 494 U. S. 1077;

No. 89–6835. WATTS *v.* FOSTER ET AL., 494 U. S. 1088;

No. 89–6869. JUSTICE *v.* OHIO ET AL., 494 U. S. 1089; and

No. 89–6888. GULATI *v.* UNITED STATES, 494 U. S. 1089. Petitions for rehearing denied.

No. 86–1964. WALLACE *v.* ARIZONA, 483 U. S. 1011. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Motion for leave to file petition for rehearing denied. JUSTICE O'CONNOR took no part in the consideration or decision of these motions.

No. 89–5629. WALLACE *v.* ARIZONA, 494 U. S. 1047. Petition for rehearing denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

JUNE 8, 1990

Dismissal Under Rule 46

No. 89–1743. BELL ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION. C. A. 10th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 892 F. 2d 64.

JUNE 11, 1990

Vacated and Remanded After Certiorari Granted

No. 89–5900. RUST *v.* GUNTER ET AL. C. A. 8th Cir. [Certiorari granted, 494 U. S. 1055.] Motion of Alvin J. Bronstein, Esq., to withdraw as counsel for petitioner granted. Judgment vacated and case remanded for further consideration in light of the representations made by counsel for petitioner appointed by the Court in his motion to withdraw as counsel filed May 22, 1990, the response to that motion filed by respondent May 30, 1990, and petitioner's motion for appointment of counsel filed June 4, 1990. Motion of petitioner for appointment of new counsel denied as moot.

JUSTICE STEVENS, concurring.

While I join the Court's disposition, I believe it is appropriate also to call the Court of Appeals' attention to our decision in *Neitzke* v. *Williams*, 490 U. S. 319 (1989)—a case that it apparently overlooked when it entered its earlier judgment.

Certiorari Granted—Vacated and Remanded

No. 89–510. MEACHUM, COMMISSIONER, CONNECTICUT DEPARTMENT OF CORRECTIONS *v.* ALEXANDER. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Illinois* v. *Perkins*, *ante*, p. 292. Reported below: 876 F. 2d 277.

No. 89–641. GARNETT, BY AND THROUGH HIS NEXT FRIEND, SMITH, ET AL. *v.* RENTON SCHOOL DISTRICT NO. 403 ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Westside Community Bd. of Ed.* v. *Mergens*, *ante*, p. 226. JUSTICE STEVENS dissents. Reported below: 874 F. 2d 608.

No. 89–1320. FLORIDA *v.* BURR. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Dowling* v. *United States*, 493 U. S. 342 (1990). JUSTICE BLACKMUN dissents. Reported below: 550 So. 2d 444.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

For the reasons stated by JUSTICE STEVENS, I agree that the judgment of the Florida Supreme Court should not be vacated.

In any event, adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, see *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would direct that the proceedings on remand be circumscribed such that the State may not impose the death sentence.

JUSTICE STEVENS, dissenting.

Respondent was convicted of first-degree murder and robbery with a firearm. To establish respondent's identity, at the guilt phase of the trial the prosecution relied on "collateral crimes evidence"—three witnesses testified that respondent had committed similar crimes *after* the fatal shooting involved in this case. At the sentencing phase of his trial, the prosecutor offered no additional evidence; the jury recommended that respondent be sentenced to imprisonment for life with no possibility of parole for 25 years.

The trial judge overrode the jury's recommendation and sentenced respondent to death. He unequivocally stated that his decision to impose the death sentence was based on the collateral crimes evidence that had been received for the limited purpose of proving respondent's identity at the guilt phase of the trial.[1]

Respondent was later tried and acquitted of one of the collateral crimes, and the State abandoned its prosecution of a second. Thereafter, in state collateral-review proceedings, respondent sought to set aside his conviction on the ground that the subsequent acquittal of one of the collateral crimes demonstrated that the evidence had been improperly admitted.[2] Over the dissent of Justice Barkett, the Florida Supreme Court rejected that conten-

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[1] See Pet. for Cert. 34–35, quoting Tr. 319–320. He observed "'that if the Williams Rules testimony admitted during this trial is found to have been improperly admitted then the sentence I impose today will be academic.'" The "Williams Rul[e]" refers to the rule announced in *Williams* v. *State*, 110 So. 2d 654 (Fla.), cert. denied, 361 U. S. 847 (1959), a case holding that evidence of other crimes is admissible in a criminal trial if relevant to prove anything other than the bad character of the defendant or his propensity to commit the crime charged. In a later case, *State* v. *Perkins*, 349 So. 2d 161 (1977), the Florida Supreme Court held that the *Williams* rule did not apply to evidence of collateral crimes for which a defendant had been acquitted.

[2] If the acquittal had *preceded* the trial in this case, the evidence would have been inadmissible under Florida law. See *State* v. *Perkins*, *supra*.

tion; it held that evidence that was properly received at the time it was offered had not been rendered "retroactively inadmissible."[3] In her dissent, Justice Barkett did not directly challenge that conclusion. She contended, however, that the State Supreme Court should have considered the propriety of the trial judge's reliance on that evidence at the penalty phase of the trial even though respondent's counsel had not squarely raised that point. She wrote:

> "I believe petitioner is entitled to a new appeal because of the trial court's application of collateral crimes evidence during the *sentencing* phase of the trial. Concededly, the issue has only been raised as it relates to the *guilt* phase, and I disagree with the majority's conclusions in this regard. However, I am deeply troubled by the effect of this evidence on the sentence, find it contrary to Florida and federal law, and cannot see the sense in waiting for a formal petition for writ of habeas corpus to argue a point I believe should have been argued on direct appeal. Thus, I would call for additional briefs and decide the issue at this time.
>
> "The death penalty was imposed in this case because the trial judge found three aggravating factors that, in his mind, rendered the jury's recommendation of life imprisonment unreasonable. Two of these factors were derived from evidence of three collateral crimes (although the defendant was acquitted of one and the state *nolle prossed* another).
>
> "The *Williams* rule was established not to prove propensity but to prove identity. The sole purpose of allowing evidence of collateral crimes is to show that the defendant indeed is the

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[3] "With the exception of the collateral crimes issue, no new information has been made available to this Court which would warrant a revisitation of those issues.

"However, Burr has argued that his subsequent acquittal of one of the crimes to which witnesses testified at his trial, and the *nolle pros* of another renders the evidence of those acts inadmissible. This Court has held that evidence of collateral offenses which have been *nolle prossed* is admissible. *Holland* v. *State*, 466 So. 2d 207 (Fla. 1985). As to the subsequent acquittal, clearly, at the time the *Williams* rule evidence was admitted, it was not error to do so. This much had been settled on direct appeal. There is no reason to suggest that the subsequent acquittal changes that admissibility subsequent to the trial. This Court will not render evidence retroactively inadmissible." *Burr* v. *State*, 518 So. 2d 903, 905 (1987) (footnote omitted).

perpetrator of the charged offense. We accept the inherent risk of prejudice that this type of evidence creates by balancing that prejudice against the relevance of proving that the defendant committed the crime.

"In the conventional use of the *Williams* rule, the state is not relieved of its obligation to prove beyond a reasonable doubt the facts and circumstances of the crime charged. To permit aggravating factors to be supported by *Williams* rule evidence not only expands the rule beyond its original purpose, but completely relieves the state of its burden of proving the existence of aggravating factors. Under this novel approach, aggravating factors could be proved merely by showing that they existed in collateral crimes committed by the accused, whether or not they actually existed in the crime charged in the indictment.

"I do not believe this was a conscious holding of this Court on the direct appeal, since it was never argued or addressed. Moreover, I do not believe this is consistent with the requirement of proving aggravating circumstances beyond a reasonable doubt.

"In this case, the judge found the aggravating factors of witness elimination and cold, calculated and premeditated murder based predominantly, if not exclusively, on the *Williams* rule evidence presented during the guilt phase of the trial.

. . . . .

"Moreover, during the penalty phase, the only material facts in issue are the existence of aggravating and mitigating factors provided by law. The aggravating factors are strictly limited by section 921.141, Florida Statutes. Under section 921.141(5), only one aggravating factor exists that in any way concerns collateral criminal activity, and it expressly is limited to prior convictions of felonies involving violence. *See* § 921.141(5)(b). To hold that a judge can consider *unconvicted* criminal conduct in reaching a sentence is to permit the weighing of nonstatutory aggravating factors, contrary to our law. *See Elledge* v. *State*, 346 So. 2d 998, 1002–03 (Fla. 1977)." *Burr* v. *State*, 518 So. 2d 903, 907–908 (1987).

While respondent's petition for certiorari was pending in this Court, we decided a case with somewhat similar facts. *Johnson* v. *Mississippi*, 486 U. S. 578 (1988). In that case a death sentence had been imposed on the basis of three aggravating circumstances, one of which was a prior New York conviction of a violent felony. In state collateral proceedings, Johnson had challenged his death sentence on the ground that the New York Court of Appeals had subsequently held that the prior conviction was invalid. The Mississippi Supreme Court, over the dissent of three justices, rejected that contention holding, in effect, that the subsequent invalidation of the felony conviction had not made the evidence retroactively inadmissible. See *Johnson* v. *State*, 511 So. 2d 1333 (1987). We reversed, concluding that the death sentence could not stand when "the jury was allowed to consider evidence that has been revealed to be materially inaccurate." 486 U. S., at 590.

Our holding in *Johnson* did not directly resolve the issue presented in Burr's pending petition for certiorari; in *Johnson* the only evidence of the collateral crime that had been received was a certified copy of the invalid conviction, whereas in Burr's trial a witness had testified about the conduct that was later made the basis of an unsuccessful criminal prosecution. This Court nevertheless concluded that there was enough similarity between the cases to justify a remand of the *Burr* case to the Florida Supreme Court to reconsider its judgment in the light of our opinion in *Johnson*. See *Burr* v. *Florida*, 487 U. S. 1201 (1988).

As the Court itself demonstrates by its action today, an order remanding a case to a lower court does "not amount to a final determination on the merits," *Henry* v. *City of Rock Hill*, 376 U. S. 776, 777 (1964), but only a conclusion that an intervening decision is sufficiently analogous to make reexamination of the case appropriate. That action was proper after *Johnson* for three important and independent reasons. First, of course, is the paramount importance of reliability in the determination that death is the appropriate punishment in any capital case.[4] In *Johnson*, as

[4] "The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special '"need for reliability in the determination that death is the appropriate punishment"' in any capital case. See *Gardner* v. *Florida*, 430 U. S. 349, 363–364 (1977) (quoting *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976)) (plurality opinion). Although we have acknowledged that 'there can be "no perfect procedure for deciding in which cases governmental authority

in this case, that concern was implicated by a post-trial development that cast doubt on the reliability of evidence that played a critical part in the sentencing decision. *Johnson* made clear, what was apparent before, see *Zant* v. *Stephens*, 462 U. S. 862, 887–888, n. 23 (1983); *Gardner* v. *Florida*, 430 U. S. 349, 358–359, 362 (1977) (plurality opinion), that a death sentence cannot stand when it is based on evidence that is materially inaccurate. Second, because the case had not yet reached the stage of federal collateral review, it was obvious that its ultimate disposition would be expedited by giving the Florida Supreme Court the first opportunity to consider the impact of *Johnson;* a different disposition would almost certainly have generated additional collateral proceedings in both state and federal courts. Third, the arguments in Justice Barkett's dissenting opinion, which were based partly on Florida law and partly on federal law, were buttressed by our reasoning in *Johnson* and had not been expressly rejected by the State Supreme Court's opinion which focused on respondent's contention that the collateral crimes evidence was inadmissible at the guilt phase of his trial.

Following our remand in light of *Johnson*, the Florida Supreme Court denied Burr's request for a new trial, but vacated his sentence and remanded the case to the trial court for resentencing.[5] In the portion of its opinion discussing the validity of the conviction, the court stated that the evidence of the collateral act for which Burr received an acquittal "is inadmissible under *Johnson*."[6] In another portion of its opinion, that may have rested exclusively on *Johnson* or may have also been predicated in part on the arguments set forth in Justice Barkett's earlier dissent, the court vacated the death sentence:

> "Our review of the record reveals that the state introduced no evidence at the sentencing phase beyond that established

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should be used to impose death,"' we have also made it clear that such decisions cannot be predicated on mere 'caprice' or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process.' *Zant* v. *Stephens*, 462 U. S. 862, 884–885, 887, n. 24 (1983). The question in this case is whether allowing petitioner's death sentence to stand although based in part on a reversed conviction violates this principle." *Johnson* v. *Mississippi*, 486 U. S. 578, 584–585 (1988).

[5] Because the original jury had recommended a life sentence, the State Supreme Court concluded that there was no need to empanel a new jury.

[6] 550 So. 2d 444, 446 (1989).

at the guilt phase. There was no evidence of two of the three aggravating factors other than the collateral crimes evidence. The United States Supreme Court held in *Johnson* that the eighth amendment requires a stringent review of death sentences based in part on improper aggravating circumstances.

"In overriding the jury recommendation of life, the trial judge found as aggravating circumstances that the murder was committed to avoid arrest; that it was committed during the course of a robbery; and, that it was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The aggravating factors of witness elimination to avoid arrest and cold, calculated, and premeditated were established almost entirely on the collateral crimes evidence. We cannot say, beyond a reasonable doubt, that the consideration of this evidence did not contribute to the sentence, particularly in light of the jury's recommendation of life.

. . . . . .

"Nor can we determine whether the one improperly admitted instance of collateral conduct was determinative of the outcome." 550 So. 2d 444, 446 (1989) (footnotes omitted).

The court's holding left the trial judge who had heard all the evidence free to rely on the evidence of two of the three collateral crimes—even though that evidence had not been offered or received for the purpose of proving aggravating circumstances at the penalty hearing. Instead of allowing the new sentencing hearing to go forward, however, the Florida attorney general decided to request this Court to correct the state court's arguably improper application of *Johnson* to this case.[7]

The Court today accedes to that request, remanding the case once again to the Florida Supreme Court, this time in the light of our more recent decision in *Dowling* v. *United States*, 493 U. S. 342 (1990). Its action is ill advised for several reasons. First,

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[7] The question presented by the State's certiorari petition reads as follows: "ON REMAND FROM THIS COURT IN *BURR* v. *FLORIDA*, [487 U. S. 1201] (1988), THE FLORIDA SUPREME COURT ERRONEOUSLY APPLIED *JOHNSON* v. *MISSISSIPPI*, [486 U. S. 578] (1988), IN VACATING THE DEATH SENTENCE AND ORDERING A NEW SENTENCING PROCEEDING." Pet. for Cert. i.

our opinion in *Dowling* sheds absolutely no light on the question whether a post-trial acquittal should render collateral crimes evidence inadmissible at a sentencing hearing in a capital case. *Dowling* merely decided, as a matter of federal law, that a pretrial acquittal did not render relevant collateral crimes evidence inadmissible at the guilt phase of a noncapital case. As a matter of state law, the Supreme Court of Florida several years ago reached a contrary (and in my opinion, a correct) conclusion on that issue. But, in any event, *Dowling* did not decide the admissibility of such evidence at the penalty phase of a capital case. Respect for this Court's legal acumen is not enhanced by asking a state court to reconsider a claim in the light of a patently irrelevant precedent.

Second, even if this Court's real purpose in remanding the case is to suggest that the state court may have extended *Johnson* beyond its precise holding, the action is nevertheless unwarranted because that extension is both completely consistent with the reasoning in *Johnson* and with the reasoning in relevant state-court cases. The state court's statement that evidence of the collateral act was "inadmissible under *Johnson*"—although not strictly accurate—was a reasonable application of that precedent, especially in light of the Florida rule that acquitted conduct is generally excepted from the rule allowing collateral crimes evidence to be used to establish identity. And, with respect to sentence, the state court's reliance on *Johnson* for the proposition that the death sentence could not stand when it was based on evidence that had been rendered unreliable was entirely correct. When a state supreme court, in compliance with our mandate, has applied an intervening decision in a permissible fashion, we should respect its decision even if we might detect a slight flaw in its opinion.

Third, the Court's action today can only prolong the termination of this litigation. I have previously noted the costs in litigation occasioned by the jury override system in those few States in which such a system is used. See *Schiro* v. *Indiana*, 493 U. S. 910, 914 (1989) (opinion respecting denial of certiorari).[8] That

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[8] See also Mello, Taking *Caldwell* v. *Mississippi* Seriously: The Unconstitutionality of Capital Statutes That Divide Sentencing Responsibility Between Judge and Jury, 30 Boston College L. Rev. 283, 290 (1989) (noting that between two-thirds and three-fourths of all life overrides reviewed by the Florida Supreme Court have been vacated and remanded for imposition of a life sentence, resentencing, or retrial); Radelet, Rejecting the Jury: The Im-

delay is exacerbated by ill-advised decisions like this one. A prompt new sentencing hearing would have eliminated the basis for substantial attacks on respondent's sentence. That hearing has already been delayed by the attorney general's petition to this Court and, depending on the action the State Supreme Court may take after this second remand, may require further collateral proceedings in both the state and federal systems. The interest in avoiding unnecessary delay would surely be served by a prompt resentencing.

Finally, I must once again express my concern about the Court's unseemly use of its discretionary docket to provide assistance to the prosecution—particularly in capital cases. In this case, a jury that heard all of the evidence recommended against a death sentence, and the trial judge's contrary decision was based in part on testimony about a crime of which Burr was later acquitted. When one considers the fact that the State has not yet come forward with a response to the points made in Justice Barkett's dissent, it is pellucidly clear that the Florida Supreme Court acted wisely in ordering a new sentencing hearing. Of course, the state court may after reconsideration adhere to its decision remanding for resentencing, just as it might have adhered, with additional explanation, to its original decision upholding the sentence after we vacated for reconsideration in light of *Johnson*. There is no good reason, however, for making the state court go through the exercise. I remain firmly convinced that "although this Court now has the power to review decisions defending federal constitutional rights, the claim of these cases on our docket is secondary to the need to scrutinize judgments disparaging those rights." *Delaware* v. *Van Arsdall*, 475 U. S. 673, 697 (1986) (dissenting opinion). Surely the State's attenuated interest in enforcing a trial judge's decision to override a jury's recommendation against the imposition of the death sentence in a marginal case like this does not justify the summary action the Court has taken today.

I respectfully dissent.

Miscellaneous Orders

No. D–807. IN RE DISBARMENT OF CALLY. It having been reported to the Court that James J. Cally has died, the rule to

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position of the Death Penalty in Florida, 18 U. C. D. L. Rev. 1409, 1422–1424 (1985).

show cause, heretofore issued on September 25, 1989 [492 U. S. 941], is hereby discharged.

No. D–858. IN RE DISBARMENT OF LOUDEN. Disbarment entered. [For earlier order herein, see 493 U. S. 1066.]

No. D–884. IN RE DISBARMENT OF SANNA. Disbarment entered. [For earlier order herein, see 494 U. S. 1053.]

No. D–886. IN RE DISBARMENT OF MCCANN. Disbarment entered. [For earlier order herein, see 494 U. S. 1064.]

No. D–888. IN RE DISBARMENT OF RABEN. Disbarment entered. [For earlier order herein, see 494 U. S. 1064.]

No. D–906. IN RE DISBARMENT OF ERICKSON. It is ordered that Jonathan Erickson, of Corning, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–907. IN RE DISBARMENT OF RICHMAN. It is ordered that Irvin F. Richman, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–908. IN RE DISBARMENT OF NEISTEIN. It is ordered that Bernard S. Neistein, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–909. IN RE DISBARMENT OF MARTIN. It is ordered that Clyde P. Martin, Jr., of New Orleans, La., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–910. IN RE DISBARMENT OF HENDRICKSON. It is ordered that Fredric Fedje Hendrickson, of Sioux Falls, S. D., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–911. IN RE DISBARMENT OF BADALIAN. It is ordered that John M. Badalian, of Shaker Heights, Ohio, be suspended from the practice of law in this Court and that a rule issue, return-

able within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 89–907. COUNTY OF LOS ANGELES ET AL. *v.* CABRALES, 494 U. S. 1091. Motion of respondent for award of attorney's fees denied without prejudice to renewal of the motion in the United States District Court for the Central District of California.

No. 89–1027. NORFOLK & WESTERN RAILWAY CO. ET AL. *v.* AMERICAN TRAIN DISPATCHERS ASSN. ET AL.; and

No. 89–1028. CSX TRANSPORTATION, INC. *v.* BROTHERHOOD OF RAILWAY CARMEN ET AL. C. A. D. C. Cir. [Certiorari granted, 494 U. S. 1055.] Further consideration of motion of respondents American Train Dispatchers Association et al. to dismiss deferred for 120 days. Further briefing in this case suspended for 120 days.

No. 89–7268. IN RE GREEN; and

No. 89–7313. IN RE GREEN. Petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 88–1847. FORD MOTOR CREDIT CO., INC. *v.* DEPARTMENT OF REVENUE, STATE OF FLORIDA. Appeal from Dist. Ct. App. Fla., 1st Dist. Probable jurisdiction noted. Reported below: 537 So. 2d 1011.

Certiorari Granted

No. 89–680. JAMES B. BEAM DISTILLING CO. *v.* GEORGIA ET AL. Sup. Ct. Ga. Certiorari granted. Reported below: 259 Ga. 363, 382 S. E. 2d 95.

No. 89–1217. LEHNERT ET AL. *v.* FERRIS FACULTY ASSN. ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 881 F. 2d 1388.

No. 89–1436. UNITED STATES *v.* R. ENTERPRISES, INC., ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 884 F. 2d 772.

No. 89–1646. UNITED STATES ET AL. *v.* SMITH ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 885 F. 2d 650.

Certiorari Denied

No. 89–1326. CROWDER, INDIVIDUALLY AND AS INDEPENDENT EXECUTRIX OF THE ESTATE OF CROWDER *v.* SINYARD ET

AL. C. A. 5th Cir. Certiorari denied. Reported below: 884 F. 2d 804.

No. 89–1378. KLAVAN *v.* KLAVAN. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 405 Mass. 1105, 544 N. E. 2d 863.

No. 89–1405. TEMENGIL ET AL. *v.* TRUST TERRITORY OF THE PACIFIC ISLANDS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 881 F. 2d 647.

No. 89–1461. GILMORE STEEL CORP., DBA OREGON STEEL MILLS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied.

No. 89–1462. HAAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 891 F. 2d 906.

No. 89–1471. BELL ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 892 F. 2d 959.

No. 89–1476. SEATTLE-FIRST NATIONAL BANK *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 892 F. 2d 792.

No. 89–1486. ACKROYD *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR INDIAN SPRINGS STATE BANK. C. A. 10th Cir. Certiorari denied.

No. 89–1518. MATHER, TRUSTEE OF THE ESTATE IN BANKRUPTCY OF WATSON, ET AL. *v.* WEAVER ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–1602. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL–CIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 89–1606. MODEL MAGAZINE DISTRIBUTORS, INC. *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 884 F. 2d 772.

No. 89–1618. BUCKLEY BROADCASTING CORPORATION OF CALIFORNIA, DBA STATION KKHI *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 891 F. 2d 230.

No. 89–1619. RAFT, AKA RAFATDJAH *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 89–1625. CITY OF BURLINGTON ET AL. *v.* KAPLAN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 891 F. 2d 1024.

No. 89–1628. SHEFFIELD *v.* JOHNSON SEED CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 892 F. 2d 76.

No. 89–1631. WRENN *v.* WALINSKI, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO. C. A. 6th Cir. Certiorari denied.

No. 89–1637. SCHINDELAR *v.* ZAWADZKI ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 89–1644. TAYLOR *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 155 App. Div. 2d 980, 549 N. Y. S. 2d 619.

No. 89–1645. MENDEL ET AL. *v.* SILVER. C. A. 3d Cir. Certiorari denied. Reported below: 894 F. 2d 598.

No. 89–1653. HEMMERLE *v.* BRAMALEA, INC., FKA BRAMALEA DEVELOPMENT U. S., LTD. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 547 So. 2d 203.

No. 89–1665. KIRKLAND *v.* NORTHSIDE INDEPENDENT SCHOOL DISTRICT. C. A. 5th Cir. Certiorari denied. Reported below: 890 F. 2d 794.

No. 89–1689. O'MALLEY ET AL. *v.* O'NEILL ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 887 F. 2d 1557.

No. 89–1694. DURA-CORP. *v.* STS D'APPOLONIA, LTD. C. A. 3d Cir. Certiorari denied. Reported below: 898 F. 2d 142.

No. 89–1713. LINDELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 881 F. 2d 1313.

No. 89–1748. OREGON NATURAL RESOURCES COUNCIL *v.* MOHLA, SUPERVISOR, MT. HOOD NATIONAL FOREST, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 895 F. 2d 627.

No. 89–1753. GARDNER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 895 F. 2d 1413.

No. 89–1767. WILK ET AL. *v.* JOINT COMMISSION ON ACCREDITATION OF HOSPITALS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 895 F. 2d 352.

No. 89–1785. LAROUCHE ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 896 F. 2d 815.

No. 89–6581. VINCENT *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 89–6715. RINGSTAFF *v.* HOWARD, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 885 F. 2d 1542.

No. 89–6757. BOLES *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 89–6795. MCCARTER *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 89–6832. CRAWFORD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 89–6872. DALY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 883 F. 2d 313.

No. 89–6927. OWENS-EL *v.* O'BRIEN ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–6964. ARTERBURN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 89–6986. ALEXANDER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 888 F. 2d 777.

No. 89–6990. HERRERO ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 893 F. 2d 1512.

No. 89–7003. CLEMMONS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 892 F. 2d 1153.

No. 89–7087. PAREZ *v.* STATE BAR OF CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied.

No. 89–7210. DEMOS *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON (two cases). C. A. 9th Cir. Certiorari denied.

No. 89–7222. CALLIS *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 898 F. 2d 144.

No. 89–7223. ANDERSON *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied.

No. 89–7224. DOWNS *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 89–7225. BROWN *v.* HUGHES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 894 F. 2d 1533.

No. 89–7226. COOPER *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 896 F. 2d 558.

No. 89–7229. QUINTANILLA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 89–7230. PERVELER *v.* SAN LUIS OBISPO COUNTY SUPERIOR COURT. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 89–7232. RITZIE *v.* CITY UNIVERSITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied.

No. 89–7233. TURNER *v.* KIRKLAND ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–7235. PETERSON *v.* TANSY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–7239. AMIRI *v.* DISTRICT OF COLUMBIA ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 282 U. S. App. D. C. 193, 893 F. 2d 400.

No. 89–7250. WILEY *v.* MCGRIFF. Ct. App. Ind. Certiorari denied.

No. 89–7258. SCOTT *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 895 F. 2d 1420.

No. 89–7262. BAGBY *v.* SOWDERS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 894 F. 2d 792.

No. 89–7264. VAN STRATEN *v.* MILWAUKEE JOURNAL NEWSPAPER PUBLISHER ET AL. Ct. App. Wis. Certiorari denied. Reported below: 151 Wis. 2d 905, 447 N. W. 2d 105.

No. 89–7273. JACKSON ET UX. *v.* DIXON-BOOKMAN. Sup. Ct. Tex. Certiorari denied.

No. 89–7285. COCHRAN *v.* TURNER, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 89–7295. LEECAN *v.* LOPES, COMMISSIONER OF CORRECTION OF CONNECTICUT. C. A. 2d Cir. Certiorari denied. Reported below: 893 F. 2d 1434.

No. 89–7297. CROW *v.* SMITH ET AL. Sup. Ct. Tex. Certiorari denied.

No. 89–7312. COCHRANE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 896 F. 2d 635.

No. 89–7377. WEXLER *v.* DEPARTMENT OF THE INTERIOR. C. A. Fed. Cir. Certiorari denied. Reported below: 889 F. 2d 1099.

No. 89–7378. DOZIER *v.* DEPARTMENT OF EDUCATION. C. A. 9th Cir. Certiorari denied. Reported below: 892 F. 2d 1045.

No. 89–7386. WASHINGTON *v.* COUGHLIN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 902 F. 2d 1556.

No. 89–7388. ARCHER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 896 F. 2d 912.

No. 89–7392. GRAY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 897 F. 2d 536.

No. 89–7393. DELAP *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 890 F. 2d 285.

No. 89–7397. JOHNSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 898 F. 2d 155.

No. 89–7403. WARE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 897 F. 2d 530.

No. 89–7408. SATURLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 890 F. 2d 420.

No. 89–7409. WARE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 897 F. 2d 1538.

No. 89–7412. ROACHE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 89–7421. GOODALLE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 89–7433. DOWDY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 897 F. 2d 536.

No. 89–7437. GONZALEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 902 F. 2d 1557.

No. 89–7438. COLBERT ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 898 F. 2d 138.

No. 89–7441. BARROSO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 896 F. 2d 557.

No. 89–7448. MCCOLLIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 900 F. 2d 265.

No. 89–7462. CLARKE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 898 F. 2d 148.

No. 89–7463. PADILLA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 89–7465. DANIELS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 897 F. 2d 1538.

No. 89–7485. ROBERTS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 89–1300. SMITH *v.* LOUISIANA. Ct. App. La., 4th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for writ of certiorari and reverse the judgment of conviction. Reported below: 543 So. 2d 555.

No. 89–1609. TERRITORY OF GUAM *v.* IBANEZ; TERRITORY OF GUAM *v.* CASTRO; TERRITORY OF GUAM *v.* DALMAL; and TERRITORY OF GUAM *v.* BOTELHO. C. A. 9th Cir. Motion of respondent Ibanez for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 880 F. 2d 108 (first case); 883 F. 2d 1024 (second and third cases); 896 F. 2d 555 (fourth case).

No. 89–1623. GARDNER *v.* NEWSDAY, INC. C. A. 2d Cir. Certiorari denied. JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE BLACKMUN would grant certiorari. Reported below: 895 F. 2d 74.

No. 89–1627. BATCH *v.* TOWN OF CHAPEL HILL, NORTH CAROLINA. Sup. Ct. N. C. Motions of Pacific Legal Foundation and National Association of Home Builders for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 326 N. C. 1, 387 S. E. 2d 655.

No. 89–1651. EUGENE D., A MINOR, BY AND THROUGH HIS MOTHER AND NEXT FRIEND, OLIVIA D. *v.* KARMAN ET AL. C. A. 6th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 889 F. 2d 701.

No. 89–6223. BITTAKER *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 89–6886. RUIZ *v.* ILLINOIS. Sup. Ct. Ill.;
No. 89–7056. BLACKMON *v.* TEXAS. Ct. Crim. App. Tex.;
No. 89–7201. COLEMAN *v.* OKLAHOMA. Ct. Crim. App. Okla.;
No. 89–7253. ELMORE *v.* SOUTH CAROLINA. Sup. Ct. S. C.; and
No. 89–7275. MCCOLLUM *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: No. 89–6223, 48 Cal. 3d 1046, 774 P. 2d 659; No. 89–6886, 132 Ill. 2d 1, 547 N. E. 2d 170; No. 89–7056, 775 S. W. 2d 649; No. 89–7253, 300 S. C. 130, 386 S. E. 2d 769; No. 89–7275, 533 N. E. 2d 1215.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 89–7289. MERRILL *v.* MINNESOTA. Sup. Ct. Minn. Motion of Minnesota Civil Liberties Union for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 450 N. W. 2d 318.

Rehearing Denied

No. 89–1376. POLYAK *v.* HULEN ET AL.; POLYAK *v.* HULEN ET AL.; POLYAK *v.* HAMILTON; and POLYAK *v.* BUFORD EVANS & SONS, 495 U. S. 904;

No. 89–1407. DAVIS, BY AND THROUGH HER GUARDIAN, FARMERS BANK & CAPITAL TRUST COMPANY OF FRANKFORT, KENTUCKY *v.* KENTUCKY FINANCE COMPANIES RETIREMENT PLAN ET AL., 495 U. S. 905;

No. 89–5855. RASHE *v.* SCHWARZER, 493 U. S. 1047;

No. 89–6431. MORRISON *v.* ALABAMA, 495 U. S. 911;

No. 89–6500. BOUDREAU *v.* COLLINS, SUPERINTENDENT, MOORE CORRECTIONAL INSTITUTION, ET AL., 495 U. S. 920;

No. 89–6725. JUSTICE *v.* CITY OF COLUMBUS ET AL., 494 U. S. 1069;

No. 89–6745. TARVER *v.* ALABAMA, 494 U. S. 1090;

No. 89–6760. JAYME *v.* BOARD OF VETERANS APPEALS ET AL., 495 U. S. 906;

No. 89–6770. ANA LEON T. *v.* FEDERAL RESERVE BANK OF CHICAGO ET AL., 494 U. S. 1086;

No. 89–6826. SIMON *v.* BETHLEHEM STEEL CORP. ET AL., 495 U. S. 907;

No. 89–6828. ROTMAN *v.* WORCESTER POLICE DEPARTMENT ET AL., 495 U. S. 907;

No. 89–6839. IN RE MARTIN, 495 U. S. 920;

No. 89–6844. BRENNAN *v.* BRENNAN ET AL., 495 U. S. 907;

No. 89–6854. SANFORD *v.* ALAMEDA-CONTRA COSTA TRANSIT DISTRICT ET AL., 495 U. S. 907;

No. 89–6894. JUSTICE *v.* REDA ET AL., 495 U. S. 908;

No. 89–6934. WEEKLY *v.* STORY, WARDEN, ET AL., 495 U. S. 935;

No. 89–7001. DIAZ *v.* UNITED STATES ET AL., 495 U. S. 909; and

No. 89–7013. LAWRENCE *v.* TEXAS EMPLOYMENT COMMISSION, 495 U. S. 937. Petitions for rehearing denied.

No. 89–1252. BASALYGA ET AL. *v.* PENNSYLVANIA ET AL., 494 U. S. 1017. Petition of Vicki Wittenbreder for rehearing denied. Petition of Gene Basalyga for rehearing denied.

JUNE 16, 1990

Miscellaneous Order

No. A–901. SWINDLER *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. Application for stay of execution of sentence of death, presented to JUSTICE BLACKMUN, and by him referred to the Court, denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution in order to give the applicant time to file a petition for writ of certiorari and would grant the petition and vacate the death sentence in this case.

JUNE 18, 1990

Certiorari Granted—Vacated and Remanded

No. 89-1221. MICHIGAN *v.* MOORE. Ct. App. Mich. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Horton* v. *California*, *ante*, p. 128.

No. 89-1701. MASTERS *v.* DANIEL INTERNATIONAL CORP. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *English* v. *General Electric Co.*, *ante*, p. 72. Reported below: 895 F. 2d 1295.

Miscellaneous Orders

No. — — ——. POLYAK *v.* STACK ET AL. Motion to direct the Clerk to docket an appeal from the United States District Court for the Middle District of Tennessee denied.

No. — — ——. FINNEY *v.* KEMP, WARDEN. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by the petitioner granted.

No. A-875. SEELIG ET AL. *v.* KOEHLER, CORRECTION COMMISSIONER OF THE CITY OF NEW YORK, ET AL. Application for stay of enforcement of random urinalysis drug-testing program, presented to JUSTICE MARSHALL, and by him referred to the Court, denied.

No. D-872. IN RE DISBARMENT OF JOYCE. Disbarment entered. [For earlier order herein, see 494 U. S. 1014.]

No. D-877. IN RE DISBARMENT OF SOLERWITZ. Disbarment entered. [For earlier order herein, see 494 U. S. 1024.]

No. D-880. IN RE DISBARMENT OF JACKSON. Disbarment entered. [For earlier order herein, see 494 U. S. 1052.]

No. D–890. IN RE DISBARMENT OF HANCOCK. Disbarment entered. [For earlier order herein, see 494 U. S. 1076.]

No. D–893. IN RE DISBARMENT OF AULVIN. John Lewis Aulvin, of Mount Carmel, Ill., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on April 23, 1990 [495 U. S. 901], is hereby discharged.

No. D–896. IN RE DISBARMENT OF JOHNSON. Charles B. Johnson, of Pasadena, Cal., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on April 23, 1990 [495 U. S. 902], is hereby discharged.

No. D–912. IN RE DISBARMENT OF BROCKMEIER. It is ordered that Frederick Brockmeier IV, of Southgate, Ky., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 89–1283. ARCADIA, OHIO, ET AL. *v.* OHIO POWER CO. ET AL. C. A. D. C. Cir. [Certiorari granted, 494 U. S. 1055.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 89–1667. PALMER ET AL. *v.* BRG OF GEORGIA, INC., ET AL. C. A. 11th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 89–5120. PERRY *v.* LOUISIANA. 19th Jud. Dist. Ct., Crim. Section V, Parish of East Baton Rouge, La. [Certiorari granted, 494 U. S. 1015.] Motion of American Psychiatric Association et al. for leave to participate in oral argument as *amici curiae* and for divided argument denied.

No. 89–7063. LANDES *v.* JOOST. C. A. 3d Cir.; and

No. 89–7300. BRITTON *v.* CENTRAL BANK. Ct. App. La., 2d Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until July 9, 1990, within which to pay the docketing fee required by Rule 38(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petitions for writs of certiorari without reaching the merits of the motions to proceed *in forma pauperis*.

No. 89–7498. IN RE DEMOS. Petition for writ of habeas corpus denied.

Certiorari Granted

No. 89–1330. INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS ET AL. *v.* BROWN. C. A. 4th Cir. Certiorari granted. Reported below: 889 F. 2d 58.

No. 89–1671. CITY OF COLUMBIA ET AL. *v.* OMNI OUTDOOR ADVERTISING, INC. C. A. 4th Cir. Certiorari granted. Reported below: 891 F. 2d 1127.

No. 89–1793. UNITED STATES *v.* GAUBERT. C. A. 5th Cir. Certiorari granted. Reported below: 885 F. 2d 1284.

No. 89–1474. MCDERMOTT INTERNATIONAL, INC. *v.* WILANDER. C. A. 5th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 887 F. 2d 88.

No. 89–1679. SUMMIT HEALTH, LTD., ET AL. *v.* PINHAS. C. A. 9th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 894 F. 2d 1024.

No. 89–7370. GOZLON-PERETZ *v.* UNITED STATES. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to the following question: "Whether the mandatory minimum terms of supervised release required by the Anti-Drug Abuse Act of 1986 became effective for offenses committed on or after the date of enactment, October 27, 1986." Reported below: 894 F. 2d 1402.

Certiorari Denied

No. 89–469. JENNINGS, INDIVIDUALLY AND AS NEXT FRIEND OF JENNINGS, A MINOR *v.* JOSHUA INDEPENDENT SCHOOL DISTRICT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 877 F. 2d 313.

No. 89–682. COLORADO DEPARTMENT OF SOCIAL SERVICES ET AL. *v.* AMISUB (PSL), DBA AMI ST. LUKE'S HOSPITAL, INC., ET

AL. C. A. 10th Cir. Certiorari denied. Reported below: 879 F. 2d 789.

No. 89–1078. CASEY, GOVERNOR OF PENNSYLVANIA, ET AL. *v.* WEST VIRGINIA UNIVERSITY HOSPITALS, INC. C. A. 3d Cir. Certiorari denied. Reported below: 885 F. 2d 11.

No. 89–1104. ALCAN FOIL PRODUCTS DIVISION OF ALCAN ALUMINUM CORP. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 889 F. 2d 1513.

No. 89–1148. DUTHU ET AL. *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 886 F. 2d 97.

No. 89–1305. HOWELL ET AL. *v.* SUPREME COURT OF TEXAS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 885 F. 2d 308.

No. 89–1360. DEVORE *v.* KERR ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–1396. SOUTHERN PACIFIC TRANSPORTATION CO. *v.* EVANS. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 213 Cal. App. 3d 1378, 262 Cal. Rptr. 416.

No. 89–1464. NOBLE *v.* TENNESSEE VALLEY AUTHORITY. C. A. Fed. Cir. Certiorari denied. Reported below: 892 F. 2d 1013.

No. 89–1484. INVESTMENT COMPANY INSTITUTE *v.* SECURITIES AND EXCHANGE COMMISSION;

No. 89–1502. AMERICAN STOCK EXCHANGE, INC., ET AL. *v.* CHICAGO MERCANTILE EXCHANGE ET AL.; and

No. 89–1503. PHILADELPHIA STOCK EXCHANGE, INC. *v.* CHICAGO MERCANTILE EXCHANGE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 883 F. 2d 537.

No. 89–1501. NATIONAL FEDERATION OF FEDERAL EMPLOYEES ET AL. *v.* CHENEY, SECRETARY OF DEFENSE, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 280 U. S. App. D. C. 94, 883 F. 2d 1038.

No. 89–1549. LEE ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION. C. A. 9th Cir. Certiorari denied. Reported below: 884 F. 2d 1304.

No. 89–1550. PENDERGRASS *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 795 S. W. 2d 150.

No. 89–1563. WILLIAMS ET AL. *v.* STONE. C. A. 2d Cir. Certiorari denied. Reported below: 891 F. 2d 401.

No. 89–1572. DENNISON ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 891 F. 2d 255.

No. 89–1630. SOLARO *v.* CASALINOVA. Ct. App. Ohio, Summit County. Certiorari denied.

No. 89–1652. NORTH VALLEY BAPTIST CHURCH *v.* MCMAHON, DIRECTOR, CALIFORNIA STATE DEPARTMENT OF SOCIAL SERVICES. C. A. 9th Cir. Certiorari denied. Reported below: 893 F. 2d 1139.

No. 89–1655. PHILLIPS *v.* OHIO. Ct. App. Ohio, Summit County. Certiorari denied.

No. 89–1657. TILLIMON *v.* OHIO. Ct. App. Ohio, Lucas County. Certiorari denied.

No. 89–1658. DOMBROSKI *v.* PEABODY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 892 F. 2d 772.

No. 89–1670. SOTO *v.* NEW JERSEY ET AL. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 236 N. J. Super. 303, 565 A. 2d 1088.

No. 89–1676. VON SCHNEIDAU *v.* LONG ET AL. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 551 So. 2d 75.

No. 89–1678. TULLER-PARK AVENUE, LTD. *v.* CITY OF DETROIT. Cir. Ct. Mich., Wayne County. Certiorari denied.

No. 89–1680. TRUSTEES OF BOSTON UNIVERSITY *v.* BROWN. C. A. 1st Cir. Certiorari denied. Reported below: 891 F. 2d 337.

No. 89–1682. STALHEIM *v.* ALBERT LEA MEDICAL SURGICAL CENTER, LTD., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 902 F. 2d 1575.

No. 89–1684. KRUSO ET AL. *v.* ITT CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 872 F. 2d 1416.

No. 89–1685. MICHIGAN *v.* GRZEGORCZYK. Ct. App. Mich. Certiorari denied. Reported below: 178 Mich. App. 1, 443 N. W. 2d 816.

No. 89–1686. SCHWEGMANN GIANT SUPER MARKETS ET AL. *v.* ROEMER, GOVERNOR OF LOUISIANA, ET AL. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 552 So. 2d 1241.

No. 89–1693. NORTON *v.* NICHOLSON ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 187 Ill. App. 3d 1046, 543 N. E. 2d 1053.

No. 89–1699. HAMM ET AL. *v.* NORRED ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 874 F. 2d 766 and 893 F. 2d 293.

No. 89–1727. SAPIA *v.* CHARTER MARKETING CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 895 F. 2d 1411.

No. 89–1729. TAPP *v.* FRANK, POSTMASTER GENERAL. C. A. 6th Cir. Certiorari denied. Reported below: 893 F. 2d 1335.

No. 89–1745. EANES *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 318 Md. 436, 569 A. 2d 604.

No. 89–1768. SHIPLEY ET UX. *v.* FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF DELAWARE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 877 F. 2d 57.

No. 89–1777. RAMIREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 897 F. 2d 526.

No. 89–1780. DEBONIS *v.* CORBISIERO ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 155 App. Div. 2d 299, 547 N. Y. S. 2d 274.

No. 89–1801. AROCENA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 902 F. 2d 1556.

No. 89–1805. WILLIAMSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 897 F. 2d 527.

No. 89–6444. QUARLES *v.* LAPPE ET AL. C. A. 3d Cir. Certiorari denied.

No. 89–6735. MEDEIROS *v.* SHIMODA, ADMINISTRATOR, OAHU COMMUNITY CORRECTIONAL CENTER, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 889 F. 2d 819.

No. 89-6758. SMITH *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 389 Pa. Super. 653, 560 A. 2d 830.

No. 89-6780. BRYANT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 892 F. 2d 1466.

No. 89-6848. HERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 891 F. 2d 296.

No. 89-6906. MCCARTHY *v.* WARDEN, CONNECTICUT STATE PRISON. Sup. Ct. Conn. Certiorari denied. Reported below: 213 Conn. 289, 567 A. 2d 1187.

No. 89-6919. TIMMONS *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 548 So. 2d 255.

No. 89-6933. MUMLEY *v.* VERMONT. Sup. Ct. Vt. Certiorari denied. Reported below: 153 Vt. 304, 571 A. 2d 44.

No. 89-6965. SWEENEY *v.* DOE ET AL. C. A. 2d Cir. Certiorari denied.

No. 89-7030. MUSGRAVES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 896 F. 2d 557.

No. 89-7038. WILLIAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 892 F. 2d 296.

No. 89-7062. JACKSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 891 F. 2d 1151.

No. 89-7071. HUDSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 884 F. 2d 1016.

No. 89-7108. BARBARO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 897 F. 2d 520.

No. 89-7110. KNAPP *v.* MASCHNER ET AL. C. A. 10th Cir. Certiorari denied.

No. 89-7134. BARRY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 895 F. 2d 702.

No. 89-7203. DELUCA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 889 F. 2d 503.

No. 89–7245. HERNANDEZ *v.* MUNICIPAL COURT OF THE LOS ANGELES JUDICIAL DISTRICT. Sup. Ct. Cal. Certiorari denied. Reported below: 49 Cal. 3d 713, 781 P. 2d 547.

No. 89–7259. FLUKER *v.* TOWNSEND. Sup. Ct. Ga. Certiorari denied.

No. 89–7261. QUARLES *v.* BRADLEY, PRESIDENT JUDGE OF THE COMMON PLEAS COURT OF PHILADELPHIA COUNTY. C. A. 3d Cir. Certiorari denied. Reported below: 897 F. 2d 523.

No. 89–7266. SINDRAM *v.* DISTRICT OF COLUMBIA ET AL. Ct. App. D. C. Certiorari denied.

No. 89–7276. NORA *v.* DIRECTOR, LAWYERS BOARD OF PROFESSIONAL RESPONSIBILITY FOR MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 450 N. W. 2d 328.

No. 89–7277. MCCOLPIN *v.* CITY OF WICHITA ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–7278. SNETHEN *v.* NIX, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 885 F. 2d 456.

No. 89–7286. BROWN *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 895 F. 2d 1421.

No. 89–7291. JONES *v.* NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DIVISION OF MOTOR VEHICLES. C. A. 4th Cir. Certiorari denied. Reported below: 894 F. 2d 402.

No. 89–7293. KLACSMANN *v.* GREENBLUM. C. A. 11th Cir. Certiorari denied.

No. 89–7299. CHERRY *v.* IOWA. Sup. Ct. Iowa. Certiorari denied.

No. 89–7304. BIRR *v.* SHILLINGER, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 894 F. 2d 1160.

No. 89–7305. BENNETT *v.* HUFF ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 899 F. 2d 12.

No. 89–7309. SOUTHERLAND *v.* CROCKER. C. A. 6th Cir. Certiorari denied. Reported below: 887 F. 2d 265.

No. 89–7315. BROWN *v.* TAYLOR ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 894 F. 2d 1336.

No. 89–7321. FAVORS *v.* ZANATY, CIRCUIT JUDGE, ALABAMA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 89–7323. ROSA R., ON HER OWN BEHALF AND AS PARENT AND NEXT FRIEND OF HER MINOR CHILD, EDWARD R. *v.* CONNELLY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 889 F. 2d 435.

No. 89–7324. MCFADDEN *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 89–7325. MCBRIDE *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. C. A. 5th Cir. Certiorari denied.

No. 89–7326. HOOKS *v.* LYNN, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 89–7329. KLACSMANN *v.* PRESLEY. C. A. 11th Cir. Certiorari denied.

No. 89–7333. KEMP *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 89–7334. MARTINEZ *v.* HENSLEY, JUDGE, NINTH JUDICIAL DISTRICT COURT, ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–7335. BRANSON *v.* GTE COMMUNICATIONS SYSTEMS CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 891 F. 2d 294.

No. 89–7343. BESTER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 894 F. 2d 1340.

No. 89–7360. HOLE *v.* PRELESNIK, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 894 F. 2d 1336.

No. 89–7361. MASON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 897 F. 2d 530.

No. 89–7367. WILLIFORD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 896 F. 2d 550.

No. 89–7382. DEMELO *v.* DEPARTMENT OF THE ARMY. C. A. Fed. Cir. Certiorari denied. Reported below: 892 F. 2d 1051.

No. 89–7390. BATES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 896 F. 2d 912.

No. 89–7400. CHILES *v.* MCCASKILL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 894 F. 2d 405.

No. 89–7402. FASSLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 89–7427. SOMYK *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 89–7443. MOELLER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 896 F. 2d 544.

No. 89–7451. BARNARD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 895 F. 2d 1418.

No. 89–7469. CAMPOS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 900 F. 2d 265.

No. 89–7475. CALVO *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Certiorari denied. Reported below: 891 F. 2d 457.

No. 89–7483. STEFENEL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 898 F. 2d 157.

No. 89–7494. FIGUEROA ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 900 F. 2d 1211.

No. 89–7509. HUNT *v.* THOMPSON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 895 F. 2d 1413.

No. 89–7619. HART *v.* OHIO. Ct. App. Ohio, Summit County. Certiorari denied.

No. 89–1445. COMMISSIONER OF CORRECTIONS OF STATE OF NEW YORK ET AL. *v.* FULLAN. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 891 F. 2d 1007.

No. 89–1662. CASTILLE, DISTRICT ATTORNEY OF PHILADELPHIA COUNTY, ET AL. *v.* CLARK. C. A. 3d Cir. Motion of

respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 892 F. 2d 1142.

No. 89–1538. WILLIAMS *v.* STONE. Sup. Ct. Ala. Motion of American Council on Education for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 554 So. 2d 346.

No. 89–1659. SCHNEIDER ET AL. *v.* APPLE COMPUTER, INC., ET AL. C. A. 9th Cir. Motion of National Association of Securities and Commercial Law Attorneys for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 886 F. 2d 1109.

No. 89–1677. KEATING ET AL. *v.* CINEMA 7, INC., ET AL. Sup. Ct. Cal. Motion of petitioners for leave to intervene in order to file a petition for writ of certiorari denied. Certiorari denied.

No. 89–1718. BANQUE DE PARIS ET DES PAYS-BAS *v.* EXXON CO., U. S. A., A DIVISION OF EXXON CORP. C. A. 5th Cir. Motion of American Bankers Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 889 F. 2d 674.

No. 89–7314. WHISENHANT *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 555 So. 2d 235.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Rehearing Denied

No. 89–6858. COLLIER *v.* UNITED STATES POSTAL SERVICE ET AL., 495 U. S. 935;

No. 89–6880. CONLEY *v.* WASHINGTON, 495 U. S. 920;

No. 89–6904. CONLEY *v.* WASHINGTON, 495 U. S. 921;

No. 89–7012. SHERRILLS *v.* WILSON ET AL., 495 U. S. 937; and

No. 89–7133. HOLLAND *v.* UNITED STATES, 495 U. S. 939. Petitions for rehearing denied.

No. 89-6665. RODMAN *v.* WILSON, DIRECTOR, OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, ET AL., 494 U. S. 1084. Motion for leave to file petition for rehearing denied.

JUNE 19, 1990

Dismissals Under Rule 46

No. 89-7503. ANDERSON *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 903 F. 2d 825.

No. 89-7519. ANDERSON *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. Ct. Crim. App. Tex. Certiorari dismissed under this Court's Rule 46.

JUNE 20, 1990

Dismissal Under Rule 46

No. 89-579. CHARTER CO. *v.* CERTIFIED CLASS IN THE CHARTER SECURITIES LITIGATION ET AL. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 876 F. 2d 866.

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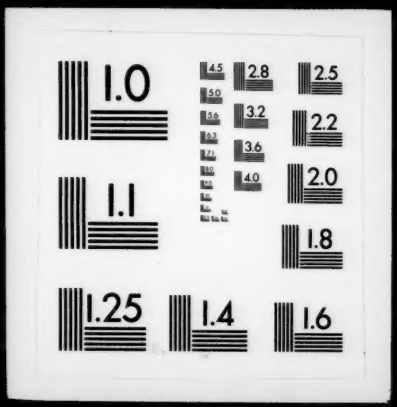
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